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# The Real Properties of Contract Law

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## THE REAL PROPERTIES OF CONTRACT LAW

MICHAEL MADISON\*

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### INTRODUCTION

This article aims to prod the reader to see the law of real estate contracts and conveyancing in a new light. The contract/conveyance dichotomy in landlord-tenant law will be briefly revisited as the *springboard* for making the case that the revolution in landlord-tenant law based on a contract approach should be extended to the law of real property conveyancing. Such a move will jolt it out of its comatose state and make conveyancing law more responsive to the needs of a modern society and more sensitive to the intentions and common sense bargaining expectations of the parties. A close analogy to this contract approach model is the sale of personal property under Article 2 of the Uniform Commercial Code,<sup>1</sup> where the passage of title is no longer a major problem-

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\* Professor of Law, Fordham University School of Law. The author wishes to thank colleagues Professor Steven Bender, Professor Joseph Perillo and Professor Robert Zinman, and former students Michael Sweeney, Esq., Joseph Gehring, Esq., and Paul Neustadt, Esq. for their valuable comments and suggestions. I also wish to thank students John Greissing,

solving modality and freedom of contract principles predominate. The article then takes this hypothesis to the logical and policy-oriented conclusion that we should do away with the real estate deed and its obsolete legal appendages. In their place we should use instead an abbreviated version of the contract as the sole instrument for transferring and recording real estate titles under our recording statute/title insurance system. Professors who teach landlord-tenant law, real estate contracts, and conveyancing frequently identify the doctrinal confusion and uncertainty<sup>2</sup> caused by the collision between modern contract principles and ancient property law as one of the unifying themes tying these materials together.

Flexible contract principles have achieved equitable results because they are based primarily on notions of fairness and bargaining expectations that shift over time in response to the changing needs of our society.<sup>3</sup> Absent a substantial disparity in bargaining power,<sup>4</sup> contract theory allows the parties the freedom to create their own bargains and have their intentions fulfilled without outside interference—so long as the terms of the bargain are not unconscionable and are not applied to produce unfair results.<sup>5</sup> Such flexibility

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<sup>1</sup> U.C.C. § 2-401 (1989).

<sup>2</sup> One notable scholar, Carol Rose, contends that in some instances the hard-edged rules of property law that are intended to define precisely obligations and entitlements (“crystals”) produce less clarity and certainty than soft-edged rules (“mud rules”). Carol Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988). For example, she explains, the common law doctrines of caveat emptor and forfeiture have become so muddled by equitable exceptions and judicial second guessing that parties no longer understand the contours of their rights and obligations. *Id.* Another explanation of this dilemma distinguishes consumer transactions from commercial transactions. While consumer transactions may require paternalism from the law in the form of “muddying” statutes and equitable principles to prevent overreaching by the party who holds superior bargaining power, the law can afford to be more “crystallized” in commercial transactions and can respect freedom of contract principles if none of the parties engage in egregious conduct.

<sup>3</sup> Just as the doctrine of stare decisis employs reasoning by analogy to keep the law current, contract theory achieves a similar result by relying on the bargaining intentions and expectations of the parties to do so.

<sup>4</sup> For example, in residential leasing, as opposed to commercial leasing, the law tends to be paternalistic. Frequently statutes circumscribe freedom of contract on the premise that most residential tenants are not represented by legal counsel and do not have the power and business acumen to protect themselves at the bargaining table. For example, in New York, residential tenants (1) may be entitled to a rent abatement if the premises are uninhabitable, N.Y. REAL PROP. LAW § 235-b (McKinney 2001), (2) have the right to sublet and share space without unreasonable interference by the landlord, N.Y. REAL PROP. LAW §§ 226-b (2)(a), 235-f (McKinney 2001), and (3) are treated preferentially with respect to their security deposits, N.Y. GEN. OBLIG. LAW § 7-103 (McKinney 2001). See discussion *infra* Part I.

<sup>5</sup> Bargained-for terms of the contract may be struck down or not enforced under

and freedom of contract allows for easier transferability of property interests and this enhanced alienability makes for a more productive use of land. By contrast, most of the property theory that underlies landlord-tenant and conveyancing law has been quite rigid, because it is rooted in early common law history when England was an agrarian society and land uses remained static. As a result, commentators on the law of sales contracts and conveyancing complain that much of property theory has become obsolete and decry the lack of any internal consistency in the body of rules that still apply.<sup>6</sup>

Indeed, much has been written about the need to modernize and simplify the law governing the contractual transfers of limited interests in real property such as leases, easements, and restrictive covenants.<sup>7</sup> By contrast, little has been said or done about reforming the law governing the contractual sale of fee simple title and other freehold interests. Nor has much effort been directed at reforming the law of real estate deeds that governs the transfer of title to such interests.<sup>8</sup> As explained in Part I and Part II, this effort at reform based primarily on a contract approach has been successful in landlord-tenant law but not in the law of real estate contracts and conveyancing, where old vestiges of property law continue to muddy the legal waters and cause problems for the

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doctrines such as waiver, estoppel, mistake, misrepresentation, illegality of contract, impossibility of performance, and disproportionate forfeiture. *See generally* JOHN D. CALAMARI & JOSEPH M. PERILLO, *CONTRACTS* §§ 9.30, 9.23, 11.29(b), 11.29(c), 11.35, 13.1, 22.1(4th ed. 1998).

<sup>6</sup> *E.g.*, Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1261 n.1 (1982) (demonstrating the general disdain for the fact that the law of easements, real covenants and equitable servitudes has not yet been revised to respond to the needs of a modern society).

<sup>7</sup> *E.g.*, French, *supra* note 6; Gerald Korngold, *Whatever Happened to Landlord Tenant Law?*, 77 NEB. L. REV. 703 (1998) (examining contract/conveyancing dichotomy and identifying new reform issues such as tort liability based on lead paint and conflicts between landlords and tenants over values and beliefs); Edward Rabin, *Symposium, The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517 (1984) (analyzing implied warranty of habitability, rent controls, landlord tort liability and other issues that arose in the reform era of the late 1960s and early 1970s). *See also* UNIF. LAND TRANSACTIONS ACT, Prefatory Note, 13 U.L.A. 539 (1986) [hereinafter U.L.T.A.]; UNIF. SIMPLIFICATION OF LAND TRANSFERS ACT § 1-102 (amended 1976), 14 U.L.A. 256 (Master ed. 1990) [hereinafter U.S.L.T.A.]. *But see* John A. Humbach, *The Common-law Conception of Leasing: Mitigation, Habitability, and Dependence of Covenants*, 60 WASH. U. L.Q. 1213, 1214-15 (1983) (contending that conveyance theory of landlord-tenant law is logically coherent).

<sup>8</sup> The movement for modernization and reform of property law started in the era of legal realism. It continued with criticisms of the 1936 Restatement (First) of Property by scholars such as Myres McDougal, and the debate between Samuel Williston and Karl Llewellyn over the Uniform Vendor and Purchaser Risk Act. Since then, apart from the unsuccessful Uniform Land Transactions Act, the Uniform Simplification of Land Transfers Act and the commentaries on these Uniform Acts, little has been said or done about reforming the law of selling and transferring fee simple titles to real property.

parties to the transaction.<sup>9</sup> Past reform efforts have failed notwithstanding a valiant effort by the National Conference of Commissioners on Uniform State Laws to simplify and modernize the law of contracts and deed transfers.<sup>10</sup> Nevertheless, a contract approach could eliminate or at least ameliorate the problems in conveyancing law caused by obsolete property principles.<sup>11</sup>

Part III contends that contract theory, along with some form of redaction of the Restatement of Property, is the reformist engine that is needed to shock

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<sup>9</sup> Examples of such dysfunctional results under the traditional law of property, sometimes referred to as “conveyance-theory,” that frequently frustrate the intentions of the parties at law and defeat their bargaining expectations include, inter alia, (1) the doctrine of *merger* under which a seller’s promise to do something, such as doubling the size of a garage within three months after the closing date, disappears once title is transferred on the closing date; (2) the doctrine of *equitable conversion* under which the purchaser must bear the risk of loss if the property being sold is destroyed by fire prior to the closing date even though the seller was in possession and control of the property and earning income from it at the time of the fire; (3) the situation in which a purchaser buys real property for \$100,000 and receives a warranty deed, and then ten years later—when the property is worth \$500,000—the purchaser-grantee is evicted by someone with the better title; under property (“conveyance”) theory she may not sue the seller-grantor for her expectancy damages even if such amount exceed her historical cost of purchasing the property plus accrued interest; and (4) a restrictive covenant at common law, such as one that prohibits using the restricted property for non-residential use, that will not be enforceable against future owners of the property unless the covenant passes muster under a long list of conveyance theory requirements that are hopelessly confusing and obsolete—such as the doctrines of vertical privity, horizontal privity, touch and concern, and changed conditions.

Observe that the property-contract dichotomy sometimes occurs in a constitutional law context that is beyond the scope of this article. In *Burton v. Tampa Housing Authority*, 271 F.3d 1274 (11th Cir. 2001), a low income tenant who had no knowledge of her son’s unlawful conduct outside her apartment unsuccessfully contended that her eviction—based on a lease provision allowing termination should any family member engage in drug-related activity—deprived her of property rights without due process. Alternatively, she could have argued that the lease was a contract of adhesion and that the lease provision was unconscionable.

<sup>10</sup> In 1975 and 1976 the Commissioners took the position that, like the law of personal property, the law of real property should be made uniform and, with a few modifications, follow the concepts and statutory framework embodied in the Uniform Commercial Code. Based on this U.C.C. analogy the Commissioners drafted and approved reform legislation—the U.L.T.A. and U.S.L.T.A.—neither of which has been fully adopted by any state. The U.L.T.A. was withdrawn by the commissioners in 1990. Ronald Benton Brown, *Whatever Happened to the Uniform Land Transactions Act?* 20 NOVA L. REV. 1017, 1018 (1996).

<sup>11</sup> The concept of a “contract approach” first appeared in Karl Llewellyn’s discussion of risk of loss issues in the debate over the terms of the Uniform Revised Sales Act (Proposed Final Draft No. 1, 1944). Karl N. Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L. Q. REV. 159, 161 (1938) [hereinafter Llewellyn, *Through Title to Contract I*]. Llewellyn argued that the risk of loss, as between a seller and buyer of goods, should not depend on who has the title to the property but on whether or not the seller is rightly performing his contract. *Id.* at 161.

antiquated property law out of its comatose state. The use of contract theory will modernize the law of real estate contracts and conveyancing and make it less confusing, more equitable, and more in conformity with bargaining expectations. Furthermore, a contract approach to the law of conveyancing might resolve nettlesome and longstanding conflicts concerning the law of easements and restrictive covenants and leave the decision as to whether covenants of seisin or warranty should run with the land to the parties themselves. Accordingly, freedom of contract principles should be respected so that the parties themselves can create their own law by means of the written word, without outside interference, on the premise that both state legislation and equitable principles will protect each party from engaging in overreaching conduct towards one another.<sup>12</sup> Part III also contends that judicial reform of property law is more likely to succeed than another attempt at statutory reform.

Part IV takes the contract versus property approach analysis one step further. If contract principles should govern and if, as contended, the real estate deed does not perform a function (other than a symbolic one), why not eliminate the real estate deed entirely and just use the contract? In a truncated form, the contract could also constitute the instrument of title and recordation. Why retain the deed as the conveyancing instrument if its legal appendages such as the doctrines of merger and equitable conversion have become obsolete? The contract can do whatever the deed has been doing and can do it better by spelling out in detail the cross-promises and intentions of the parties. As a matter of logic and symmetry, a contract approach to conveyancing should work better in tandem with a contract as opposed to a deed. Part IV also recommends that the current system of two transactions—execution of contract followed by a delivery of the deed on the closing date—should be collapsed into a single transaction where execution of the entire contract and recordation of an abbreviated version of the contract occur simultaneously. Doing so would clarify the intentions of the parties and reinforce the notion that the relevant law is the law of the contract and not the law of the deed. As is presently the case, subsequent purchasers and encumbrancers would be protected under our current recording statute/title insurance system. At the same time, the attendant formalities of recording a property interest would be simplified and the transactional costs would be reduced.

Part V of this article briefly raises certain practical considerations and issues such as what, if anything, would constitute legal evidence of ownership and how record notice would work in mechanical terms if the deed should be replaced by the contract as the instrument of recordation. Please note that this article aims to present the big picture; therefore, its broad brush format has made it necessary to sacrifice some details as to its parts. For this an advance apology is given.

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<sup>12</sup> See *supra* text accompanying note 4.

I. CONTRACT APPROACH FOLLOWED IN LANDLORD-TENANT LAW<sup>13</sup>

Within the recent past, progressive-minded courts have achieved equitable results without offending the doctrine of stare decisis by applying general contract principles (“contract approach”) to leases at the expense of property or so-called conveyancing theory (“property approach”). The property approach focuses on the legal fact that a lease is a leasehold estate created by a contract. As such, it usually represents a carve-out of the landlord’s fee simple ownership whereby the landlord conveys a possessory slice, namely the legal right to possession of the real property for a period of time.<sup>14</sup> The leasehold estate becomes the *property* of and is *owned* by the lessee-tenant, as opposed to an ongoing executory contract where the performances continuously flow back and forth from each party to one another: possession from the landlord to the tenant and, in exchange, rent from the tenant to the landlord. The property approach discussed here dictates that because the leasehold estate belongs to the tenant it becomes his sole responsibility; he has exclusive control and all others—including the landlord—in effect are strangers to the interest. As reflected by the landlord’s implied covenant of quiet enjoyment, a landlord without cause cannot intentionally do anything to disturb the possession of the tenant; by doing so he would risk suit for trespass or in tort.<sup>15</sup>

Furthermore, at common law, the tenant assumes the risks associated with ownership of the leasehold estate. Under the property law doctrine of caveat emptor, the tenant must inspect the premises beforehand for defects in the possessory interest being purchased. Once the leasehold estate is purchased and belongs to the tenant, it is the responsibility of the tenant, and not the landlord, to keep the property in fit condition during the term of the lease. A

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<sup>13</sup> For those readers who are thinking that Part I is “old hat” from the late 1960s and early 1970s, it is hard to understand Part II without reading Part I. In addition, the principal topic in Part I—the warranty of habitability—is still very much alive today. *E.g.*, Christopher Brennan, Note, *The Next Step in the Evolution of the Implied Warranty of Habitability: Applying the Warranty to Condominiums*, 67 *FORDHAM L. REV.* 3041 (1999) (arguing that the warranty should be applied to condominium owners).

<sup>14</sup> At common law, possessory estates or so-called tenancies include the tenancy for years, where the lessee’s legal right to possession must end at or before a fixed date; the periodic tenancy which continues for successive periods until terminated on notice from either the lessor or lessee; the tenancy at will which can be terminated at the will of either the lessee or lessor; and the tenancy at sufferance which describes the status of a holdover tenant who may or may not be accepted by the lessor for another term. Frequently, the notice required to terminate the latter three types of tenancies is regulated by statute. A “lease” is nothing more than a leasehold estate or tenancy that is created by contract between the lessor-landlord and lessee-tenant. *See generally* JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 53-58 (3d ed. 1989) (describing the historical significance of the lease and its categories at common law).

<sup>15</sup> The landlord who invades a tenant’s space without permission or just cause could be sued for forcible entry and detainer. *See, e.g.*, *Jordan v. Talbot*, 361 P.2d 20, 22 (Cal. 1961).

tenant who does not do so can be sued for permissive waste.<sup>16</sup> The tenant also bears the risk in the following scenarios: (1) if a holdover tenant prevents the tenant from entry into possession, it is the responsibility of the tenant and not the landlord to oust the holdover tenant;<sup>17</sup> (2) if the premises are suddenly destroyed the tenant is still responsible for the payment of the rent;<sup>18</sup> and (3) if the tenant abandons her leasehold estate, then because it is her property to do with as she sees fit, the landlord is not responsible in any way for mitigating the abandonment, which is invariably deemed to be a default under the lease contract.

The following simple example illustrates what happens in the event of a material breach by the tenant under property theory. Suppose L, the landlord, agrees to lease Blackacre to T, the tenant, for ten years at a rental of \$1000 per year, payable at the beginning of each year. T defaults by not paying the rent for year number six. Under the property approach, the lease does not terminate unless there was a forfeiture provision placed into the lease contract or L takes some affirmative action, like bringing summary proceedings to terminate the lease. Further assume L immediately terminates the lease under its default provision and mitigates the damages by reletting the premises to T-2 for \$500 a year for the five year balance of the lease term. Under contract principles, L's actual damages are the \$2500 shortfall for years six through ten. Under the property approach the damages are zero because the forfeiture or other termination extinguished the tenant's obligation to pay rent. Damages on the prematurely shortened lease term of only five years are also zero under a property approach because T met his obligations in respect to the first five years of the lease term. Hence, L is not entitled to his actual damages of \$2500 unless he created a "contract law" result by including a so-called survival of liability clause in the default provision of the lease.<sup>19</sup>

During and after the reform period of the late 1960s and early 1970s, frustration with obsolete property principles led many commentators to characterize the lease as a contract rather than as a conveyance of a property interest.<sup>20</sup> Others defended the status quo.<sup>21</sup> Certainly, there are legal areas

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<sup>16</sup> See generally CRIBBET & JOHNSON, *supra* note 14, at 266-67.

<sup>17</sup> See *infra* note 69 and accompanying text.

<sup>18</sup> See *infra* notes 70-72 and accompanying text.

<sup>19</sup> See *infra* note 79 and accompanying text.

<sup>20</sup> E.g., John Forrester Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443, 445 (1972) (asserting that the contractual nature of leases "has been inherent in them for many years and is now beginning to break through the surface"); Thomas M. Quinn & Earl E. Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225, 226 (1969) (characterizing landlord-tenant law as contract or sales law because the rights and duties of each party are related to and dependent on those of the other); Bettina B. Plevin, Note, *Contract Principles and Leases of Realty*, 50 B.U. L. REV. 24, 25 (1970) (recommending the application of contract principles to leases to establish remedies that replace obsolete doctrines).



besides landlord-tenant law where the conveyance approach to leases remains useful. For example, § 365(h) of the Bankruptcy Code makes a distinction between a contract and a conveyance in order to protect a tenant if his landlord should become a debtor under the Bankruptcy Code.<sup>22</sup> Perhaps the most sensible approach recognizes that a lease is a *hybrid* instrument that is *both a contract as well as the conveyance of a leasehold estate*,<sup>23</sup> and as one

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<sup>21</sup> See Edward Chase, *The Property-Contract Theme in Landlord Tenant Law: A Critical Commentary on Schoshinski's American Law of Landlord and Tenant*, 13 RUTGERS L.J. 189, 194 (1982) ("[T]he doctrine of partial eviction appears to specify *both* the right and the remedy in ways that rather obviously conflict with contract law."); Humbach, *supra* note 7, at 1215 ("The recent importation of half-truth versions of contract principles into landlord-tenant law does not, however, treat leases as ordinary contracts, nor is it very good jurisprudence.")

<sup>22</sup> Under § 365(h) of the Bankruptcy Code, if a landlord is a debtor in bankruptcy, it may reject, or disaffirm, executory contracts, including leases of real property. By treating a lease as a conveyance and not just as a contract, the debtor-landlord may be prevented from terminating his leases. 11 U.S.C. § 365(h) (1994). Otherwise, a residential tenant of the landlord could be deprived of her residence, a business tenant could be deprived of its business, and in the case of a ground lease, a ground lessee could be deprived of its ground lease, which could wipe out any leasehold mortgage that does not encumber the fee and any subleases attached to the ground lease. To make this protection of the leasehold estate clear, § 365(h) provides that when a landlord-debtor rejects a lease, the tenant can elect to retain its rights under the lease (including covenants appurtenant to the leasehold estate) with the right to deduct from the rent the cost of performing covenants that the landlord is unable to perform. See generally John Creedon & Robert Zinman, *Landlord's Bankruptcy: Laissez Les Lessees*, 26 BUS. LAW. 1391 (1971). In explaining the history behind § 365(h) of the Bankruptcy Code, the drafters of the 1938 Chandler Act amendments explained that "the tenant's estate of which he cannot be deprived . . . by the trustee's rejection of the lease or any covenant therein necessarily includes the tenant's right to possession upon payment of the reserved rental and his options of renewal and extension . . ." *Id.* at 1439. And as one of the drafters, Professor James Angell MacLachlan, pointed out, "I had in mind the general principles of property and contract, chiefly in the broad frame of reference in which I have been accustomed to insist to my first year Property students [at Harvard Law School] that a lease is a conveyance and not just a contract." *Id.* at 1439.

<sup>23</sup> *E.g.*, *In re Kavalchychk*, 154 B.R. 793, 799 (Bankr. S.D. Fla. 1993) (stating that a lease is a contract right that must be perfected under the Uniform Commercial Code); *Newfeld v. Chemical Dynamics Inc.*, 784 S.W.2d 240, 242 (Mo. Ct. App. 1989) (stating that a lease creates both privity of contract and estate between lessor and lessee); *cf.* Robert H. Kelley, *Any Reports of the Death of the Property Law Paradigm for Leases Have Been Greatly Exaggerated*, 41 WAYNE L. REV. 1563, 1605 (1995) (noting that while the construction of leases under a contract law paradigm is consistent with the expectations of parties, the expectations of landlords and tenants under ground and air rights leases are different and should be construed under a hybrid of contract and property law principles). Some courts have held that a lease cannot be terminated by the doctrine of commercial frustration on the property approach rationale that a lease is a conveyance and therefore performance is completed once the lease is executed, while most modern courts hold that the doctrine applies to leases because a lease is a contract. See CALAMARI & PERILLO, *supra* note 5, at 517

commentator explains,<sup>24</sup> it inherently involves multifaceted relationships. Historically, the issue most in need of reform was the lack of any implied warranty of habitability in residential leases. Under the common law doctrine of caveat emptor, a landlord has no obligation to deliver the premises in habitable condition.<sup>25</sup> The property approach reasons that a tenant who purchases a leasehold estate should inspect the premises beforehand to protect herself against defects that exist at the commencement of the lease term: if the tenant does not protect herself by walking away or by demanding curative measures of the landlord, why should the law rescue him from his folly? There were very few exceptions to this rule.<sup>26</sup>

The landmark case in which the court imposed an implied warranty of habitability to commencement defects in a residential lease is *Pines v. Perssion*.<sup>27</sup> In that case four students at the University of Wisconsin entered into a one-year lease agreement for a furnished house that was filthy and badly in need of repair, as reflected by numerous building code violations including a kitchen sink, toilet, furnace and handrails on stairs that all needed to be fixed. There were undiscoverable latent defects such as defective plumbing, heating, and wiring systems. The landlord, who unbeknownst to the students had been living in the house, had allegedly told the students that he would clean up the house, paint it, and have it in suitable condition for student housing at the beginning of the school year. When the students arrived in September, the house was still in filthy condition. After futile self-help efforts, they sought advice of local counsel and brought in a city building inspector, who then cited the landlord for numerous code violations. Finally, the students abandoned the premises and sued the landlord.

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n.11 (citing cases); see also RESTATEMENT (SECOND) OF PROPERTY, Landlord and Tenant, Introductory Note (1977).

<sup>24</sup> Korngold, *supra* note 7, at 708-09.

<sup>25</sup> *E.g.*, *Franklin v. Brown*, 118 N.Y. 110, 115 (1889) (maintaining that tenant hires at his peril and caveat emptor throws on the lessee the responsibility of examining as to the existence of defects in the premises); *Shwalbach v. Shinkle, W. & K. Co.*, 97 F. 483, 484 (C.C.S.D. Ohio 1899) (stating that it is well-settled law that no implied warranty of habitability exists nor can lessor be held liable for those defects which could have reasonably been discovered by lessee).

<sup>26</sup> One exception occurs where the landlord commits fraud because the defect is latent and the landlord says nothing. This exception is based on a warranty of fitness associated with household goods. *Shwalbach*, 97 F. at 484. Another exception, where the tenant executes a short term lease of furnished premises, is based on the notion that a short-term tenant of furnished premises such as a tenant who rents a summer cottage may not have an adequate opportunity to meet his caveat emptor burden by making a beforehand inspection, *Pines v. Perssion*, 111 N.W.2d 409, 412 (Wis. 1961), and the notion that a short-term tenant impliedly bargains for immediate use, *Ingalls v. Hobbs*, 156 Mass. 348, 350 (1892) ("An important part of what the [tenant] pays for is the opportunity to enjoy the premises without delay, and without the expense of preparing it for use.").

<sup>27</sup> 111 N.W.2d 409, 409 (Wis. 1961).

The Wisconsin Supreme Court held in favor of the students based on the theory that the lease contained an implied warranty of habitability.<sup>28</sup> Innumerable courts have since cited *Pines v. Perssion* for the following pro-warranty policy argument:

To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, *caveat emptor*. Permitting landlords to rent “tumbledown” houses is at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for conscientious landowners.<sup>29</sup>

Policy alone without legal theory, however, is rarely strong enough to overturn centuries of well-entrenched property law. For that reason, *Pines v. Perssion* is of little precedential value in the judicial struggle to establish warranty protection for residential tenants. The decision in *Pines* can be explained in a number of ways without breaking new legal ground, for example: (1) by the fraud exception to the general no-liability rule;<sup>30</sup> (2) by the exception for short-term leases of furnished premises; or (3) by the applicable Wisconsin statute.<sup>31</sup> The only pro-warranty argument resembling a contract approach was the statement by the court that “[s]ince there was a failure of consideration, respondents are absolved from any liability for rent under the lease and their only liability is for the reasonable rent value of the premises during the time of the actual occupancy.”<sup>32</sup> The court never spelled out this

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<sup>28</sup> *Id.* at 413.

<sup>29</sup> *Id.* at 412-13 (citing the legislature’s policy judgment that rendering the common law rule of implied warranty of habitability obsolete serves socially and politically desirable ends) (emphasis in original). Another persuasive anti-caveat emptor policy argument is the analogy to the law of personal property: namely, why should residential tenants be denied warranty protection while purchasers and lessees of personal property receive such protection? Arguably, a warranty of fitness for use is more necessary for lessees of residential space because living space is a necessary and vital commodity and such residential tenants frequently have less bargaining power than purchasers and lessees of consumer goods such as cars and refrigerators.

<sup>30</sup> Some of the commencement defects were latent and the landlord knew about them. Indeed, the landlord as the predecessor-in-possession probably caused them. *Pines*, 111 N.W.2d. at 413.

<sup>31</sup> WIS. STAT. § 234.17 (1971) (current version in § 704.07(4)(2000)) broadly provides that a tenant may extricate himself from a lease without liability where the building being leased is destroyed or so injured by the elements, or for any other cause made to be uninhabitable, if the destruction or injury occurred without his fault or neglect. See generally A. JAMES CASNER & W. BARTON LEACH, CASES AND TEXT ON PROPERTY 506-07 (3d ed. 1984); Edmund C. Chmielinski, Recent Decisions, *Landlord and Tenant—Application of Implied Warranty*, 45 MARQ. L. REV. 630, 630 n.1 (1962).

<sup>32</sup> *Pines*, 111 N.W.2d at 413 .

failure of performance argument and it probably would not have worked anyway. In the case of a commencement defect (in contrast to a post-commencement defect) that is not a latent defect, if the tenant argues that the normal bargaining expectation is for premises that are usable and fit for occupancy, the counter-argument is that she could have protected herself by making a beforehand inspection.<sup>33</sup>

Likewise, at common law the landlord has no implied obligation to maintain the premises in habitable condition once the tenant enters into possession. The doctrine of caveat emptor is irrelevant because a beforehand inspection by the tenant cannot protect the tenant against defects that come into existence after the lease term begins. Rather, the rationale for absolving the landlord from any duty to maintain the premises is the infamous no-repair rule under which the landlord is not responsible for ordinary repairs of the premises. This property rule evolved centuries ago when England was an agrarian society and the essence of the bargain for the tenant was use of the land and not the buildings. In those days the common law model of a tenant was a jack-of-all-trades farmer who was perfectly capable of repairing rudimentary structures as farm cottages and barns. What led to the demise of the infamous no-repair rule was the holding and contract approach employed in *Javins v. First National Realty Corp.*<sup>34</sup> and its progeny.<sup>35</sup> How did the majority in *Javins* succeed where so many other jurists had failed?<sup>36</sup> The answer has to do with the ingenuity and

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<sup>33</sup> Note, however, that the court gave the student-plaintiffs a contract damages remedy for breach of the warranty in the form of a rent abatement equal to the difference between the rent paid for September (\$175) and the reasonable value of the premises during the time of actual occupancy. *Id.*

<sup>34</sup> 428 F.2d 1071, 1072 (D.C. Cir. 1970) (holding that the law implies a warranty of habitability into leases of urban dwelling units and that breach of such warranty gives rise to the usual remedies for breach of contract); *cf.* *Brown v. Southall Realty Co.*, 237 A.2d 834, 837 (D.C. Ct. App. 1968) (imposing an implied warranty of habitability on landlords with respect to commencement defects under an “illegal contract” theory).

<sup>35</sup> *E.g.*, *Jack Spring, Inc. v. Little*, 280 N.E.2d 208, 215-18 (Ill. 1972); *Breezewood Mgmt. Co. v. Maltbie*, 411 N.E.2d 670, 673-74 (Ind. Ct. App. 1980); *Mease v. Fox*, 200 N.W.2d 791, 793 (Iowa 1972); *Boston Housing Auth. v. Hemingway*, 293 N.E.2d 831, 843 (Mass. 1973); *King v. Moorehead*, 495 S.W.2d 65, 75 (Mo. Ct. App. 1973); *Marini v. Ireland*, 265 A.2d 526, 532-34 (N.J. 1970); *Kline v. Burns*, 276 A.2d 248 (N.H. 1971); *Park W. Mgmt. Corp. v. Mitchell*, 391 N.E.2d 1288, 1292-93 (N.Y. Ct. App. 1979); *Foisy v. Wyman*, 515 P.2d 160, 164 (Wash. 1973) (noting that jurisdictions across the country implicitly began recognizing that landlord-tenant disputes are decided by traditional contract law principles through abolishing the doctrine of caveat emptor and relying on the implied warranty of habitability). *But cf.* *Kelley*, *supra* note 23, at 1569-70 (demonstrating instances when states revert back to property law in solving landlord-tenant disputes after seemingly establishing contract law).

<sup>36</sup> *See Bowles v. Mahoney*, 202 F.2d 320, 325-28 (D.C. Cir. 1952) (Bazelon, J., dissenting) (arguing in favor of an implied warranty of habitability for landlord). In *Bowles*, the majority applied the general rule of nonliability for landlords, in order to hold a landlord not liable for injuries caused to a young child—who was an invitee of the tenant—because a

persuasiveness of the contract approach employed by the United States Court of Appeals for the District of Columbia (led by Judge J. Skelly Wright) in reaching its decision.

Essentially there are three steps to the *Javins* rationale that favors the implied warranty of habitability with respect to post-commencement defects. First and foremost, Justice Wright tied the Court's contract approach to the housing code system and thereby buttressed its argument by tying it to the District of Columbia's strong public policy interest in protecting the life, health and safety of its citizens.<sup>37</sup> This strong state interest justified the far-reaching dictum in the decision declaring any attempt by a landlord to extract a waiver from a tenant to be void as against public policy.<sup>38</sup> The court reasoned that otherwise, in areas where there is a shortage of affordable housing, landlords could simply demand that their tenants waive their warranty protections.<sup>39</sup>

Secondly, the court reasoned that as a matter of common sense, a contract—no matter how perfectly drafted—cannot spell out every detail of the bargain intended by the parties.<sup>40</sup> Some matters and promises have to be implied.<sup>41</sup> Just as a covenant of quiet enjoyment is implied in every lease agreement, so too are the cross promises of the parties that each will perform his or her side

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retaining wall collapsed. *Id.* at 324. Justice Bazelon's argument was marred by a glaring flaw: on one hand he contends that "[c]ourts are not impervious to the unequal bargaining position of the [landlord versus tenant]" while in the same space he espouses a warranty "in the absence of express provision to the contrary." *Id.* at 326-27 (Bazelon, J., dissenting). This meant the protection afforded to the tenant could be waived at the insistence of the landlord. By arguing that the warranty of habitability was compelled by the housing code system, he could have made the rule non-waivable. Note that Justice Bazelon belonged to the same court that decided *Javins* eighteen years later.

<sup>37</sup> *Javins*, 428 F.2d at 1079-80 (noting that low-income tenants who live in substandard housing often lack the bargaining power to protect themselves against overreaching landlords).

<sup>38</sup> *Id.* at 1081-81 ("The duties imposed by the Housing Regulations may not be waived or shifted by agreement . . .").

<sup>39</sup> *Id.* at 1082 ("This regulatory structure was established by the commissioners because, in their judgment, the grave conditions in the housing market required serious action."). This is where *Javins* broke new ground. Other courts have held in favor of the implied warranty by simply reciting that a lease is a contract and that the bargaining expectation of the tenant is that he receive habitable premises. This is a weak argument in the case of a defect existing at the beginning of the lease term because of caveat emptor. *See supra* note 25. In the case of a post-commencement defect, the argument has more force. Without the housing code connection, however, the warranty protection is waivable.

<sup>40</sup> *Id.* at 1081 (stating that the housing code must be read into housing contracts).

<sup>41</sup> For example, a lease agreement to an apartment on the twentieth floor of a high-rise may not expressly entitle the tenant to use the elevator, but such easement right is obviously implied. More to the point, if a contractor agrees to fix the roof of your house, must he expressly agree in the contract to do the repair in a manner that conforms to the local building code? Obviously not.

of the lease bargain in a manner that is consistent with local law standards.<sup>42</sup> In viewing the lease primarily as a contract, the *Javins* court held that the housing and health code obligations of the landlord must be read into the lease agreement because residential landlords have an implied obligation to perform their side of the bargain in a manner consistent with the standards of local law.<sup>43</sup> To hold otherwise would prevent the court from deterring serious code violations that could impair the health and safety of residential tenants.<sup>44</sup>

Thirdly, the court overcame the remaining common law obstacle to a meaningful remedy, namely the doctrine of independent covenants. It followed the example of the court in *Pines v. Perssion* and used one sentence to declare effectively that a lease is a contract and therefore the tenant's obligation to pay rent should be mutually dependent on the landlord's performance in a manner consistent with local law standards.<sup>45</sup> Since *Javins*, some form of warranty had been imposed by case law<sup>46</sup> or by statute<sup>47</sup> in nearly every state and the District of Columbia<sup>48</sup>

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<sup>42</sup> *Id.* (“[B]y signing the lease the landlord has undertaken a continuing obligation to the tenant to maintain the premises in accordance with all applicable law.”).

<sup>43</sup> *Id.*

<sup>44</sup> Landlord advocates countered by arguing that the housing code system provides for fines and other sanctions for code infractions and that to allow tenants the remedy of a permanent rent abatement would be tantamount to giving tenants an unbargained-for extra private remedy. If such sanctions are laxly enforced, the landlords continued, then it is the job of the legislature and not the courts to amend the system. The *Javins* court responded to this very legitimate argument by taking the position that the housing regulations, while self-enforcing, do not prohibit an extra common law remedy and that as a matter of common knowledge, housing codes are laxly enforced, and a virile contract remedy allowing for rent reductions is needed to spur recalcitrant landlords into compliance. *Id.* at 1079-80.

<sup>45</sup> *Javins*, 428 F.2d at 1081; *Pines v. Perssion*, 111 N.W.2d 409, 413 (Wis. 1961).

<sup>46</sup> *E.g.*, *Pugh v. Holmes*, 405 A.2d 897, 900 (Pa. 1979) (calling for the abolition of caveat emptor and adopting an implied warranty of habitability in residential leases).

<sup>47</sup> *E.g.*, N.Y. REAL PROP. LAW § 235-b (McKinney 1989 & Supp. 2000) (warranty of habitability deemed incorporated into every residential lease).

<sup>48</sup> *See* LA. CIV. CODE ANN. art. 2692-95 (2000); N.C. GEN. STAT. ANN. § 42-42 (2000); S. C. CODE ANN. § 27-40-440 (2000); *Thompson v. Crownover*, 381 S.E.2d 283, 285 (Ga. 1989); *O’Cain v. Harvey Freeman & Sons, Inc.*, 603 So. 2d 824, 832 (Miss. 1991); *Detling v. Edelbrock*, 671 S.W.2d 265, 270 (Mo.Banc. 1984); *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973); *Wade v. Jobe*, 818 P.2d 1006, 1010 (Utah 1991); *Hilder v. St. Peter*, 478 A.2d 202, 208-11 (Vt. 1984); *see also* Mara J. Bresnick, Case Note, *Knight v. Hallsthammar: The Implied Warranty of Habitability Revisited*, 15 LOY. L.A. L. REV. 353, 354 n.4 (1982) (citing cases); Francis S. L’Abbate, Note, *Recovery Under Implied Warranty of Habitability*, 10 FORDHAM URB. L.J. 285, 292 nn.31-32 (1982) (citing cases). *But cf.* *Blackwell v. Del Bosco*, 558 P.2d 563, 565 (Col. 1976) (calling for legislative intervention to determine if adopting the implied warranty of habitability is proper given the many social and economic issues). Additionally, the Colorado Court of Appeals noted that courts who have adopted this remedy “have not expressed agreement on what form it is to take—by what standard breach of warranty is to be measured, whether it may be waived or

The contract approach employed in *Javins* gave residential tenants a meaningful remedy against overreaching landlords for the first time in common law history. In order to appreciate the importance of the decision, one must understand what came before it. Traditionally, the tenant's only option at common law was the weak property law remedy of constructive eviction that allows the tenant to vacate the premises without liability only if the tenant can prove that (1) the landlord failed to meet some obligation owed to the tenant, (2) that such failure had rendered the premises uninhabitable, and (3) that the tenant had vacated within a reasonable time.<sup>49</sup> This right to vacate presupposes that the tenant has the wherewithal to find better alternative housing, but this is seldom the case for the indigent tenant who lives in substandard housing.<sup>50</sup> In addition to constructive eviction, residential tenants prior to and after *Javins* availed themselves of various statutory remedies, but typically these statutes required the tenants to pay rent into the court or to a third party administrator and thereafter allowed the landlord to collect the escrowed rent once the code violations were cured.<sup>51</sup> By contrast, the *Javins* remedy allows the tenant to obtain a permanent abatement in the rent equal to the diminution in value of the tenant's leasehold estate during the noncompliance period in the event of material code violations. The *Javins* court complicated matters, however, by describing a vague formulation to calculate diminution.<sup>52</sup> A subsequent case clarified matters somewhat by

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disclaimed, or what measure of damages should be available to the aggrieved tenant." *Id.*; see also *Murphy v. Hendrix*, 500 So. 2d 8, 8 (Ala. 1986) (suggesting that adoption of new laws is a function of the legislature while refusing to recognize the implied warranty of habitability in the landlord-tenant context); *Propst v. McNeill*, 932 S.W.2d 766, 769 (Ark. 1996) (stating that "only an express agreement or assumption of duty by conduct can remove a landlord from the general rule of nonliability"); *Ortega v. Flain*, 902 P.2d 199, 202-04 (Wyo. 1995) (refusing to abrogate the common law).

<sup>49</sup> Constructive eviction is merely an exception to the doctrine of independent covenants and is still the only remedy available to commercial tenants. CALAMARI & PERILLO, *supra* note 5, §14.8.

<sup>50</sup> Furthermore, in the case of a new enterprise it is difficult for the commercial tenant to prove damages as a consequence of the eviction and attendant loss of profits because the plaintiff-tenant must prove the amount of damages with reasonable certainty. See *Milheim v. Baxter*, 103 P. 376 (Colo. 1909); CALAMARI & PERILLO, *supra* note 5, §14.8.

<sup>51</sup> See, e.g., N.Y. REAL PROP. ACT. & PROC. LAW § 755 (McKinney 1979) (rent strike triggered by constructive eviction where rent paid into court during the stay of the eviction proceedings by landlord for nonpayment of rent); N.Y. MULT. DWELL. LAW § 302-a(3) (McKinney 1974) (Tenant can stop paying rent if so-called rent-impairing violations continue for six months, but rents must be paid into court when action is commenced against tenant).

<sup>52</sup> *Javins*, 428 F.2d at 1082-83 (describing tenant's remedy).

At trial, the finder of fact must make two findings: (1) whether the alleged violations existed during the period for which past due rent is claimed, and (2) what portion, if any or all, of the tenant's obligation to pay rent was suspended by the landlord's breach. If no part of the tenant's rental obligation is found to have been suspended,

indicating that “the proper measure of damages for breach of the warranty is the difference between the fair market value of the premises if they had been as warranted, as measured by the rent reserved under the lease, and the value of the premises during the period of the breach.”<sup>53</sup>

Obviously the tenants most in need of a remedy against landlords who let their buildings deteriorate are indigents. Such tenants usually live in poor urban or rural areas and can only afford to live in substandard housing. Consider the damages for such a tenant under a constructive eviction as compared to damages based on the *Javins* approach. Except for special damages that the tenant can prove, the recovery for a constructively evicted residential tenant is usually limited to damages equal to the loss of the lease bargain, which means the actual market value of the premises over and above the rent the tenant agreed to pay.<sup>54</sup> Suppose, for example, that a tenant rents an apartment at \$400 a month for three years in the worst neighborhood in town, where landlord compliance with code standards is minimal. Further assume that the code violations reduced the value of the living space by fifty percent and that after the first year the tenant is constructively evicted. The only available housing in the same neighborhood rents for the same amount of money and is in no better condition. Under a constructive eviction remedy, the tenant’s damages as a consequence of the eviction would be zero or nominal, even if the code violations had reduced the value of the apartment by fifty percent during the last two years of the lease. This is because the damages remedy under constructive eviction only measures the loss of the lease bargain, and her lease bargain was worth zero since she was not paying a below-market rent as compared to rents for comparable housing. By contrast, under *Javins*, the damages remedy measures the extent of the loss in the value of the premises that is caused by the code violations; therefore, the same tenant would be entitled to \$4,800 (\$200 per month for twenty-four months) in damages that could be used to offset the rent permanently as it accrued during the breach. Put simply, under constructive eviction the tenant recovers damages only if she loses a below-market rental, whereas under *Javins* the tenant recovers if she lives in below-standard living space.

As shown in the example above, the major impact of the *Javins* contract remedy is that it provides a much more powerful remedy than the traditional property law remedy of constructive eviction. It is therefore much more likely to spur landlords into corrective action. Landlords, like most real estate investors, tend to be highly leveraged and any significant abatement in the rent could prevent the landlord from meeting his debt service payments on his

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then a judgment for possession may issue forthwith. On the other hand, if the jury determines that the entire rental obligation has been extinguished by the landlord’s total breach, then the action for possession on the ground of nonpayment must fail.

*Id.* (citations omitted).

<sup>53</sup> *Park West Management Corp. v. Mitchell*, 391 N.E.2d 1288, 1295 (N.Y. 1979).

<sup>54</sup> *Id.* See *Milheim*, 103 P. at 378.



mortgage as well as his other operating expenses.<sup>55</sup> Moreover, any substantial constriction in the flow of rental income could constitute a default under the landlord's mortgage, assignment of lease instrument, and other security documents held by the lender-mortgagee.<sup>56</sup>

In the interests of sound public policy, both landlords' advocates and economists have criticized implied warranties of habitability as forcing landlords to abandon their housing investments and causing rent increases. This "abandonment argument" runs as follows: in jurisdictions where local governments do not regulate rents or where demand for rental space exceeds supply, rents will escalate because landlords will simply pass their extra repair costs and insurance premiums associated with these warranties to their tenants in the form of additional rents.<sup>57</sup> Alternatively, in jurisdictions where rents are regulated or where supply of rental space exceeds demand, the extra warranty costs may make ownership of rental units unprofitable, in which event landlords will abandon their housing investments, exacerbating the housing shortage and likewise causing higher rents.<sup>58</sup>

From a law and economics perspective, proponents of the more absolutist and conservative "Chicago school" (such as Judge Richard Posner) look askance at these warranties.<sup>59</sup> They base their criticism on the economics argument that more stringent housing code enforcement will increase tenant demand for higher quality housing. Assuming a very elastic demand curve for indigent tenants and an elastic supply curve for low income housing, they

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<sup>55</sup> MICHAEL MADISON, JEFFREY DWYER, & STEVEN BENDER, *THE LAW OF REAL ESTATE FINANCING* §§ 12.12-12.16 (2002).

<sup>56</sup> *Id.*

<sup>57</sup> *E.g.*, Charles J. Meyers, *The Covenant of Habitability and the American Law Institute*, 27 *STAN. L. REV.* 879 (1995) (suggesting that warranties shorten the lifespan of buildings by raising landlord costs and reducing maintenance resources). However, the few empirical and statistical studies to date suggest that warranties of habitability and other tenant protections had little impact on the stock and cost of residential housing during the 1970s when these warranties and other reforms were imposed in many, if not most, jurisdictions. *See, e.g.*, Rabin, *supra* note 7 and accompanying text. Professor Rabin does contend, however, that during the 1970s, when housing conditions improved and residential vacancy rates increased, certain factors prevented an increase in residential rents and a decrease in housing stocks. *Id.* at 561-62 (listing an increase in ownership that led to a decrease in rentals as one such factor).

<sup>58</sup> *See supra* note 57. *But see, e.g.*, Bruce Ackerman, *More on Slum Housing and Redistribution Policy: A Reply to Professor Komesar*, 82 *YALE L. J.* 1194, 1203-04 (1973) (arguing that uncertainty as to the effect of housing code regulations will not likely affect the future cost considerations of builders).

<sup>59</sup> RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 514-17 (5th ed. 1998). According to this absolutist view, which has its roots in the utilitarianism ideas of Jeremy Bentham, justice, simply put, is the maximization of wealth that happens when a market is perfect and allowed to operate freely. *See generally* Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, 26 *J.L. & ECON.* 163 (1983).

argue that the net result would be higher rentals and that lower class tenants would be replaced by middle class ones as housing would become less affordable. Conversely, if rentals were kept by regulation at the pre-renovation levels and profits to the landlords were reduced (in a market where profits were already depressed in relation to costs), the landlord would withdraw from the low income housing market. Such action would exacerbate the housing shortage. Proponents of this view would probably contend that stricter enforcement of housing codes deprives lower income tenants of their freedom to make their own economic decisions. An indigent tenant, for example, may only be able to afford to live in cheaper, substandard housing. Warranties are therefore unjust, they would argue, because they do not promote the twin goals of aggregate wealth maximization and allocative efficiency.<sup>60</sup>

Proponents of the liberal and more relativist school of economic analysis, such as Professor Duncan Kennedy, probably would favor warranty protection for tenants. Under this less inclusive approach, there is room to take into account other values beside utilitarianism. One might contend that the state has a strong interest in protecting its citizens who are tenants against housing code violations that could affect their health and safety. Supporting this contention is the fact that the protection afforded to residential tenants is not subject to waiver, because such a waiver would be void as against public policy regardless of whether the warranty were imposed by case law or statute. Finally, a counter-argument to the abandonment argument can be made based on the tax shelter and unrealized appreciation benefits associated with ownership of income-producing rental property.<sup>61</sup>

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<sup>60</sup> See, e.g., POSNER, *supra* note 59, at 26-27.

<sup>61</sup> To use a simplified example, suppose an investor, "O," who lives in a jurisdiction that imposes an implied warranty of habitability, acquires a small apartment building on some land for a total price of \$200,000 (equal to its appraised value), of which \$50,000 is allocable to the land and \$150,000 to the building. Assume that O gets a mortgage loan with a 75% loan-to-value ratio and invests \$50,000 of her own money, and that at the end of the year all of her rental income from the building exactly equals all of her operating expenses, including her interest payments on the mortgage and her *extra* insurance premiums and repair costs caused by her warranty obligations. Her cost basis in the building (\$150,000) divided by the cost recovery period of 27.5 years that is applicable to residential property would yield a straight-line depreciation deduction of \$5,455. This would produce a tax loss that would be worth \$2,106 to O, assuming that O is an individual in the maximum 38.6% federal marginal tax bracket (for ordinary income) and that O is a real estate professional (under Internal Revenue Code § 469(c)(7)) who can use the tax deduction to offset her ordinary income from outside sources (e.g., salary, dividends, interest from bonds). A maximum marginal rate on ordinary income for individuals is assumed to be 38.6%, which is the rate effective for 2002; the bulk of President Bush's tax reduction plan will not take into effect until at least 2004, however, and it is scheduled to disappear in 2011. Also assume that the land appreciates at an annual rate of 5%, so that at the end of the year she would benefit from unrealized appreciation in the value of the land amounting to \$2,500. Thus at the end of the year her after-tax and land appreciation benefit would total \$4,606, or a 9.2 % rate of return on her \$50,000 cash investment, *even if the*

Some have argued that a *Javins* style damages remedy lacks justification because, in most cases involving slum housing, the landlord merely delivers what the indigent tenant bargained for, namely, substandard housing that is cheaper than housing that conforms to the housing codes.<sup>62</sup> Under contract law, however, it is implied that each party to a contract will perform its side of the bargain in a manner that is consistent with local law standards.<sup>63</sup> For example, a contractor hired to make repairs on a house has an implied duty to do the job in conformity with local building and health codes regardless of the hirer's bargaining expectations.<sup>64</sup> Indeed, a waiver of such protection is probably void as against public policy. This argument also ignores the strong state interest in avoiding the heavy social costs cited by the *Pines* court.<sup>65</sup> A contract approach has prevailed over traditional conveyance theory in several other areas of landlord-tenant law. The table below presents some examples. Courts have also begun to apply the contract doctrine of anticipatory breach to leases.<sup>66</sup> In addition, they have recognized the principles of good faith and fair dealing that are implied into every contract and have refused to enforce lease provisions that are unconscionable.<sup>67</sup>

Furthermore, the archaic property approach has produced untoward results in other areas of landlord-tenant law, such as the *Rule in Dumpor's Case*,<sup>68</sup> the

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*extra warranty expenses should produce a zero cash flow for O.* If the property is held for at least a year and sold or disposed of sometime thereafter, any taxable gain attributable to the depreciation deduction of \$5,455 would be taxed at the maximum long-term capital gain rate of 25 percent.

<sup>62</sup> *Rabin*, *supra* note 7, at 524 (describing how the literal application of a *Javins* approach would yield no damages to defendants living in slum property in cases where landlords delivered the promised substandard housing).

<sup>63</sup> See CALAMARI & PERILLO, *supra* note 5, at 157 (summarizing the idea that existing law is generally understood to be incorporated into contracts).

<sup>64</sup> See *Schiro v. W.E. Gould & Co.*, 118 Ill. 2d 538, 545 (Ill. 1960) (dismissing complaint where defendant had failed to build plaintiff's house in compliance with local sewage ordinances).

<sup>65</sup> *Pines*, 111 N.W. 2d at 412-13 (explaining that housing standards help eliminate urban blight and other problems).

<sup>66</sup> See, e.g., *Pitcher v. Benderson-Wainberg Assoc.*, 715 N.Y.S.2d 104, 106 (2000) (finding the lease to contain mutually interdependent contractual obligations so that anticipatory breach should not have been recognized as a matter of law).

<sup>67</sup> See *Ilkhchooyi v. Best*, 37 Cal. Rptr.2d 766, 768 (Cal. Ct. App. 1995) (applying doctrine of unconscionability to approval clause); *Newman v. Hinky Dinky Omaha-Lincoln, Inc.*, 427 N.W.2d 50, 55 (Neb. 1988) (applying requirement of good faith and reasonableness to an approval clause); see generally CALAMARI & PERILLO, *supra* note 5 § 11.38; see also N.Y. REAL PROP. LAW § 235-c (McKinney 1989 (codifies doctrine of unconscionability as it applies to leases)).

<sup>68</sup> 76 Eng. Rep. 1110 (K.B. 1578); see *Reid v. Wiessner & Sons Brewing Co.*, 40 A. 877, 878 (Md. Ct. App. 1898) (citing *Dumpor's Case* and the effects of the doctrine); see also Marianne M. Jennings, *Real Property Could Use Some Updating*, 24 REAL EST. L.J. 103, at 116 (1995) ("[O]nce a landlord allows a tenant to assign or sublease, the property can then

Problem	Property Approach	Contract Approach
<b>Holdover Tenant</b>	Holds that the possession being impinged upon belongs to the new tenant and therefore it is his responsibility, and not the obligation of the landlord, to use summary proceedings to oust the holdover tenant. <sup>69</sup>	Requires the landlord to deliver not only the legal right to possession but also the actual possession because the new tenant really bargains for the latter when he agrees to purchase the property interest. <sup>70</sup>
<b>Abandonment of Premises</b>	Landlord not required to relet premises because leasehold estate is tenant's property to do with as he pleases. <sup>71</sup>	Landlord must mitigate damages. <sup>72</sup> Policy favors this approach. <sup>73</sup>
<b>Constructive Eviction<sup>74</sup></b>	Remedy requires showing intentional failure of performance by landlord.	Landlord's failure of performance will suffice.
<b>Commercial Frustration</b>	Owner of possession must bear risks as well as benefits of possession. <sup>75</sup>	Doctrine should be recognized as flowing from the contract principle of "impossibility of performance." <sup>76</sup>

common law rule that if the premises should be fortuitously destroyed the tenant is still obligated to pay the rent and is still bound to the lease agreement because the essence of a lease bargain is the use of the land rather than the use of the improvements.<sup>77</sup> Amelioratory statutes in some jurisdictions have changed this onerous result by extricating tenants from the lease bargain if the premises are destroyed through no fault of the tenant.<sup>78</sup> A property approach also requires landlords to include survival of liability clauses in lease default provisions to preserve their right to collect expectancy damages on a default by the tenant.<sup>79</sup>

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be assigned, subleased, or subleased by anyone without the landlord's further permission.").

<sup>69</sup> *E.g.*, *Hannan v. Dusch*, 153 S.E. 824, 831 (Va. 1930). Another argument in favor of the American rule rests on a tort law view of the holdover problem. In a sense the holdover tenant has misappropriated or converted the leasehold estate belonging to the new tenant, and this would argue against holding the landlord responsible for the tort-like action committed by a third party wrongdoer over whom the landlord has no direct control.

<sup>70</sup> *E.g.*, N.Y. REAL PROP. LAW § 223-a (McKinney 2001) (stating the English rule requiring that lessor deliver possession at the beginning of the lease term imposed by statute); *Moore v. Cameron Parish Sch. Bd.*, 563 So.2d 347, 350 (La. Ct. App. 1990) (holding that there is a duty on behalf of the lessor to deliver the property leased); *see* UNIF. RESIDENTIAL LANDLORD TENANT ACT §§ 2.103, 4.102, 7B U.L.A. 566, 614 (1972) (Master ed. 2000) [hereinafter U.R.L.T.A.] (following the English rule, requiring landlord to deliver actual possession, and allowing tenant to cancel in the event of a holdover, in which case the

rent abates until tenant obtains possession). The Restatement (Second) of Property adopts the modified English rule whereby a tenant can cancel the lease and sue the landlord for damages if the landlord does not remove the holdover tenant within a reasonable period of time, during which the tenant is entitled to appropriate relief from the rent obligation. RESTATEMENT (SECOND) OF PROPERTY § 6.2 (1976); *cf.* Rabin, *supra* note 7, at 540 (suggesting that in the period from 1964 until 1984 the American rule has been largely abandoned).

<sup>71</sup> *Wright v. Baumann*, 398 P.2d 119, 120 (Or. 1965) (noting in dicta that a majority of courts hold that a lessor need not mitigate damages when lessee abandons); *see also* 1 RESTATEMENT (SECOND) OF PROPERTY § 12.1 (3) (1977). Comment (i) provides the following policy rationale:

A tenant who abandons leased property is not entitled to insist on action by the landlord to mitigate the damages, absent an agreement otherwise. Abandonment of property is an invitation to vandalism, and the law should not encourage such conduct by putting the duty of mitigation of damages on the landlord.

*Id.*

<sup>72</sup> *See Austin Hill Country Realty Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293, 297 (Tex. 1997) (stating that the landlord in forty-two states and the District of Columbia has a duty to use objectively reasonable efforts to mitigate by re-letting the premises if a tenant breaches the lease and abandons the premises). In 1997, through the above-mentioned case law as well as by statute (current version at TEX. PROP. CODE ANN. § 91.006 (2000)), Texas became the forty-third state to recognize that the landlord has a duty to mitigate damages. There are, however, significant differences between the two. *See* Thomas M. Whelan, *Enforcement of Commercial Leases: Evictions and Dealings with a Tenant's Personal Property*, 3 TEX. WESLEYAN L. REV. 283, 363 (1997); *see also* U.R.L.T.A. § 4.203 (c), 7B U.L.A. 632 (Master ed. 2000) (stating that if residential tenant abandons property, then landlord must make reasonable effort to re-let at a fair rental); Lisa Kerszenewejg, Note, *Contracts v. Conveyances: A Criticism of Stonehedge Square Ltd. Partnership v. Movie Merchants, Inc.*, 61 U. PITT. L. REV. 559 (2000) (arguing, through its criticism of the Pennsylvania Supreme Court for ignoring relevant precedent and reverting back to the property approach, for the Pennsylvania state legislature to amend the Landlord and Tenant Act of 1951, PA. STAT. ANN. tit. 68, § 250.101 (1994) to ensure avoidance of societal and economic problems associated with vacant property).

<sup>73</sup> If the landlord can refuse to relet the premises, let it lie fallow, and still charge the abandoning tenant the full rental, then the following adverse consequences might occur: (a) the landlord prevents a substitute tenant from putting the land to a productive use; (b) if the lease is commercial, the tenant abandons because he can't make a go of the present location and he ends up paying an extra rental at another location, which pushes him into insolvency and makes his creditors suffer; or (c) the landlord refuses to relet the premises out of spite and thereby winds up with punitive damages that he never bargained for and otherwise doesn't deserve. The landmark article criticizing the no-mitigation rule is Charles McCormick, *The Rights of the Landlord Upon Abandonment of the Premises by the Tenant*, 23 MICH. L. REV. 211 (1925).

<sup>74</sup> *Compare* *Milheim v. Baxter*, 103 P. 376, 377 (Colo. 1909) (constructive eviction defined as any act willfully done by a landlord which justifies the tenant vacating the leased premises) *with* *Blackett v. Olanoff*, 358 N.E.2d 817, 820 (Mass. 1977) (landlord's conduct and not his intentions are controlling); *see* *Hicks*, *supra* note 20, at 460 (showing that although the judicial system attempted to establish a property theory to remedy breaches of

the implied covenant of quiet enjoyment, the doctrine of constructive eviction is indistinguishable from the contract theory of mutuality of covenants); *see also*, *Hughes v. Westchester Dev. Corp.*, 77 F.2d 550, 550-51 (D.C. Cir. 1935); *Net Realty Holding Trust v. Nelson*, 358 A.2d 365, 366 (Conn. Super. Ct. 1976) (finding landlord not responsible for damage done to tenant's property by intruders when landlord had no relationship to intruders and was unaware of the harassment); *Richards v. Dodge*, 150 So. 2d 477, 481 (Fla. Dist. Ct. App. 1963) (finding landlord had not breached the covenant of quiet enjoyment when "housemother" in an all-female building had knowledge of a male tenant but did not give timely notice of objection to male tenant or demand remedy from landlord before abandoning the premises); *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 460-461 (N.J. 1969); *Dyett v. Pendelton*, 8 Low. 727 (N.Y. Sup. Ct. 1827); *McNamara v. Wilmington Mall Realty Corp.*, 466 S.E.2d 324, 328 (N.C. Ct. App. 1996) (citation omitted) (affirming trial court's ruling that there was a triable issue of fact as to whether landlord had breached the covenant of quiet enjoyment when he did not sufficiently cure noise nuisance from adjacent tenant to abandoning tenant's satisfaction after eight months of nuisance). *Compare* *Stevan v. Brown*, 458 A.2d 466, 470 (Md. Ct. App. 1983) *with* *Biggs v. McCurley*, 25 A. 466, 468 (Md. Ct. App. 1892); *Schaaf v. Nortman*, 120 N.W.2d 654, 657 (Wis. 1963) (distinguishing landlord's failure to perform from breach in determining constructive eviction).

<sup>75</sup> *CALAMARI & PERILLO*, *supra* note 5, at 517 n.11 (outlining doubts over whether doctrine of frustration can discharge a lease because a lease is a conveyance of an estate in land and execution of the lease completes performance).

<sup>76</sup> *See CALAMARI & PERILLO*, *supra* note 5, §§ 13-12 (citing coronation cases in which defendants were excused from performance after the king became ill because they rented apartments for the sole purpose of viewing the coronation). In one case, the court applied the doctrine, but the automobile-dealer tenant was nevertheless not extricated from the lease because frustration was foreseeable and not total when the lease was executed. *Lloyd v. Murphy*, 153 P.2d 47, 51-52 (Cal. 1944); *cf.* *Scottsdale v. Plitt Theatres, Inc.* 1999 U.S. Dist. LEXIS 7785, at \*9 (N.D. Ill. 1999) (recognizing doctrine as a "viable defense" in Illinois); *Sage Realty Corp. v. Jugobanka, D. D. N. Y. Agency*, 1998 U.S. Dist. LEXIS 15756, at \*5 (S.D.N.Y. 1998) (citing New York's frustration of purpose defense which discharges duty to perform under a contract); *N. Am. Capital Corp. v. McCants*, 510 S.W.2d 901, 902-03 (Tenn. 1974) (finding frustration of purpose when the supervening event was reasonably foreseeable). *But cf.* *Home Design Center - Joint Venture v. County Appliances of Naples, Inc.*, 563 So. 2d 767, 770 (Fla. Dist. Ct. App. 1990) (indicating that even a broad application of the doctrine of commercial frustration does not permit this defense when the problem could have reasonably been avoided). *See also* U.R.L.T.A. § 4.106, 7B U.L.A. 622 (Master ed. 2000) (listing tenant's options in case of casualty or fire damage); *cf.* *RESTATEMENT (SECOND) OF PROPERTY* § 9.3 (1977) (applies doctrine only in cases of extreme hardship resulting from governmental action).

<sup>77</sup> *E.g.*, *Osterling v. Sturgeon*, 156 N.W.2d 344, 347 (Iowa 1968) (requiring tenant to pay rent when bowling alley flooded due to natural disaster); 1 *AMERICAN LAW OF PROPERTY* § 3.103 (A.J. Casner ed., 1952) (citing cases holding that tenants must pay rent after building destroyed); 1 *FRIEDMAN ON LEASES* § 9.1 (3d ed. 1990) (stating that common law rule on damage or destruction requires tenant to continue paying rent).

<sup>78</sup> *E.g.*, *N.Y. REAL PROP. LAW* § 227 (McKinney 2001) (explaining that tenant may surrender premises where destruction was not his fault if there is no express agreement to the contrary); *WIS. STAT. ANN.* § 704.07(4) (West 2000) (describing how tenant may leave premises without being liable for rent unless landlord makes prompt repairs); *see also*

Ultimately, landlord-tenant law was reformed primarily by case decisions spurred by the Restatement (Second) of Property and not by a uniform statute. Consider the example of the implied warranty of habitability. The warranty of habitability imposed by the Uniform Residential Landlord-Tenant Act merely follows the earlier case law doctrine that had already been established in *Pines* and *Javins* and their progeny.<sup>80</sup> The discussion that follows contends that the same judicial approach should apply to extend the contract approach to the law of real estate contracts and conveyancing and the law of servitudes.

## II. CONTRACT VERSUS PROPERTY APPROACH TO THE LAW OF CONVEYANCING

The trend towards contract principles has clarified and modernized landlord-tenant law by exorcising obsolete property law doctrines. Accordingly, a contract approach could similarly reform the law of contracts and conveyancing. After all, if a lease, which is only part contract and part property, can be “contractized” to improve lease law, then a real estate contract, which is all contract, should be amenable to a contract approach. The same should apply to its obsolete and cumbersome appendage, the real estate deed. Yet this area of law, with a few notable exceptions,<sup>81</sup> has been all but

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U.R.L.T.A. § 4.106, 7B U.L.A. 622 (listing tenant’s options in cases of fire or casualty and adopted in nine states); RESTATEMENT (SECOND) OF PROPERTY § 5.4 (1977) (allowing the tenant to terminate if a sudden non-manmade force renders the premises unsuitable for the purposes contemplated by the parties).

<sup>79</sup> See, e.g., *Jamaica Builders Supply Corp. v. Buttelman*, 205 N.Y.S.2d 303, 307 (1960); see generally, FRIEDMAN, *supra* note 77, § 16.302 (rules concerning landlord’s re-letting premises after tenant’s abandonment); see also CASNER & LEACH, *supra* note 31, at 638 n.16.

<sup>80</sup> U.R.L.T.A. § 2.104, comment, 7B U.L.A. 566, 567 (Master ed. 2000)(citing cases following the uniform rule that landlord must maintain the premises). The Restatement (Second) of Property imposed an implied warranty of habitability based on housing code and allowed *Javins*-styled rent abatement remedy. RESTATEMENT (SECOND) OF PROPERTY § 5.5 (1977). The warranty, however, was imposed “except to the extent the parties to a lease validly agree otherwise” thereby suggesting that a waiver may be permitted. *Id.* (emphasis added). For a discussion of how the warranty of habitability has been extended by judicial decision to cooperatives and has otherwise evolved over the last decade, see Brennan, *supra* note 13 and accompanying text.

<sup>81</sup> Contract law did not exist as a separate body of law in medieval times, but courts started to take contract doctrine into account in the early 19th century. One of the earliest efforts to apply a contract approach to the law governing real estate contracts and conveyancing was the effort by Professor Samuel Williston to change the law with respect to the risk of loss in contracts to sell real property. In his forty year campaign, starting in 1895 with a pair of articles, continuing with his 1920 treatise and his work on the 1932 Restatement (First) of Contracts and culminating with the Unif. Vendor and Purchaser Risk Act of 1935, his thinking shifted from a focus on “ownership” to theories rooted in contract law. See generally Robert L. Flores, *Risk of Loss in Sales: A Missing Chapter in the History of the U.C.C.: Through Llewellyn to Williston and a Bit Beyond*, 27 PAC. L.J. 161, 175-203

bypassed by the contract approach.

The following examples illustrate this proposition. Suppose Olin Owner agrees to sell land and a building he owns in fee simple (called Blackacre) to Pat Purchaser for \$100,000 by means of an enforceable contract with a closing date set for three months after the contract is executed. Under traditional property law the following results would occur:

- (1) Suppose Olin promises in the contract to provide marketable title, to deliver a special warranty deed on the closing date, and to double the size of the barn within three months after the closing date. If once the title closes Pat discovers that someone else owns the land on which the barn is situated or, in the alternative, that Olin fails to make the barn larger, Pat would have no recourse against Olin under the contract because of the merger doctrine. To make matters worse, Pat would also have no remedy under the deed because a special warranty deed (like a quitclaim deed) contains no promises by the seller-grantor other than a limited covenant against encumbrances under which the grantor merely promises that it has done nothing to encumber the land.
- (2) One month before the closing date, Olin is in possession and the house on Blackacre burns down through no fault of either Olin or Pat. Under property law, the risk of loss during the contract period must be borne by the purchaser, Pat, even though Olin is in possession, enjoys the benefits of the property, and is in a better position to protect it from a casualty loss. This result is based on the simplistic axiom “that equity regards as done what ought to be done,” meaning that once the contract is executed the positions of the parties are reversed and Pat is regarded to be the “real” or beneficial owner and as such should bear the risk of loss.
- (3) Suppose Pat obtains a warranty deed from Olin that contains a promise of good title in the form of a covenant of seisin and a promise of indemnity in the form of a covenant of warranty. Five years after the closing of title Blackacre is worth \$200,000, and Pat is evicted from Blackacre by someone with a better (paramount) title. If Pat sues Olin for damages for breach of the covenant of seisin, his recovery is limited to the original purchase price of \$100,000 plus accrued interest, and Pat is not entitled to any expectancy damages.
- (4) Under traditional property theory, the so-called *present* covenants in a warranty deed that relate to the status of the title, such as a covenant of seisin and covenant against encumbrances, generally do not run with the land for the benefit of the promisee’s successors in title whereas the so-called *future* covenants like the covenant of warranty do run with the land for the benefit of remote vendees. Suppose Olin delivers a deed that contains only a covenant of seisin to Pat and Pat subsequently delivers a

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(1996) [hereinafter Flores I] (recounting historical development of contract law beginning with Williston); *see also* discussion *infra* at Part II.B. Professor Richard A. Epstein has also advocated a contract approach to the law of servitudes. *See infra* Part II.E.



deed without the covenant to Patricia Purchaser who is ousted by someone with a better title to Blackacre. Because of the formalistic difference between present and future covenants, Pat, who received full payment for Blackacre, would be able to sue Olin and recover on the covenant of seisin (albeit nominal damages) but Patricia, the party who is really injured, cannot recover damages for breach of the covenant.

- (5) Under traditional servitudes law the parties are fettered by overlapping rules and obsolete property law doctrines such as the privity and the touch and concern requirements for enforcement of restrictive requirements that can lead to unjust results that defeat the bargaining expectations of the parties. Suppose Olin sells Blackacre but retains ownership of an adjacent property called Whiteacre, and to protect the value of Whiteacre, Olin insists that the deed to Pat contain a promise that neither Pat nor his successors and assigns will ever use Blackacre for nonresidential purposes. Further assume that Olin sells Whiteacre to Oliver and Pat leases Blackacre to Patricia and that, notwithstanding her notice of the restrictive covenant in her chain of title, three years later she commences a business activity on Blackacre when the character of the neighborhood is still residential. Under the property rule called "strict vertical privity," if Olin's successor, Oliver, who now owns Whiteacre, should sue Patricia for money damages based on the restrictive covenant his suit would fail in those jurisdictions that still take privity seriously, because of the lack of strict vertical privity between Pat and Patricia. By contrast, under a contract approach the right to sue on the covenant would be assignable and the burden transferable, and therefore Oliver would be allowed to recover.
- (6) Suppose Pat purchases a residence from Olin and three months after the closing date a crack appears in a bearing wall that will cost \$5000 to fix. The structural defect could have been discovered by an expert had Pat commissioned a diligent beforehand inspection. Pat chose not to arrange for such inspection because it would have been too expensive. Olin refuses to do anything about the problem. Even though the Uniform Commercial Code has rejected the antiquated and much criticized property law doctrine of caveat emptor with respect to consumer goods, the doctrine is still tolerated with respect to the sale of a home that more directly impacts on the health, safety and welfare of the consumer than does a typical consumer good like a washing machine. Under a contract approach, a seller like Olin would be charged with an implied warranty of habitability on the rationale that the normal bargaining expectation of a typical purchaser is that he or she will receive premises that are fit for use.

#### A. *The Doctrine of Merger*

Under contract rules, all legal promises in the contract are presumed to have been bargained for by the parties, and absent impossibility of performance or

other excuse, promises of an executory nature are enforceable against the promisor as soon as any conditions precedent are met. The buyer under a contract to purchase realty may however lose the power to enforce a promise in the contract upon closing of title because of the well-established rule that, once the deed is transferred on the closing date, the contract *merges* into the deed and the contractual rights of the purchaser disappear. Thereafter, the only remedy available to the purchaser-grantee is one based on the covenants, if any, contained in the deed.<sup>82</sup> Historically, the merger rule is based on the property law concept that when the same owner winds up at the same time with two interests or estates that give him the same rights in the same property, then the two interests should collapse or “merge” into one.<sup>83</sup> In a ground-lease, for example, if the ground-lessee has an option to purchase the fee title, a mortgagee who lends money on the security of a lien on the leasehold estate—called a “leasehold mortgage on an unencumbered fee”—will demand an anti-merger provision. Otherwise, the ground-lease as security for the leasehold could be extinguished once the mortgagor purchases the fee.<sup>84</sup>

While the merger rule is said to be universally accepted,<sup>85</sup> there is little agreement as to what its present rationale is, what exceptions exist, and when these exceptions apply. The rule is sometimes justified by the strained notion that a deed is a fully integrated secondary sales contract that supersedes prior agreements under the parol evidence rule and therefore bars contradictory terms in a prior contract.<sup>86</sup> Under this rationale, the deed’s status as a

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<sup>82</sup> The merger doctrine first appeared in the United States in 1808. *Howes v. Barker*, 3 Johns. 506, 508 (N.Y. Sup. Ct. 1808); see *Tower S. Prop. Owners Ass’n v. Summey Bldg. Sys., Inc.*, 1995 U.S. App. LEXIS 2881 at \*8 (4th Cir. 1995) (describing the merger doctrine as a long-standing rule); see generally Lawrence Berger, *Merger By Deed—What Provisions of a Contract for the Sale of Land Survive Closing?*, 21 REAL ESTATE L.J. 22 (1992) (examining the merger doctrine and contract theory); Paul Teich, *A Second Call for Abolition of the Rule of Merger by Deed*, 71 U. DET. MERCY L. REV. 543, 568 (1992) (urging courts to stop laboring to support the “monolithic doctrine”). One commentator has suggested that the doctrine of accord and satisfaction is a more appropriate doctrine. Edwin M. Ginsburg, *The Doctrine of Merger with Respect to Real Estate Transaction: Taking the Bull by the Horns*, 16 NOVA L. REV. 1171, 1173 (1992).

<sup>83</sup> Ginsburg, *supra* note 82, at 1203 n.188 (1966).

<sup>84</sup> MICHAEL MADISON, ROBERT ZINMAN, STEVEN BENDER, *MODERN REAL ESTATE FINANCE AND LAND TRANSFER—A TRANSACTIONAL APPROACH*, § 7.15 (2002).

<sup>85</sup> Teich, *supra* note 82, at 544; Brennan, *supra* note 13. *But cf.* Barry M. Goldman & Victoria S. Berghel, *Common Law Doctrine of Merger: The Exceptions Are the Rule*, 13 BALT. L. REV. 19, 20 (1983) (suggesting that the rule is rarely controlling).

<sup>86</sup> CALAMARI & PERILLO, *supra* note 5, § 3.2(a) (explaining the policies behind the rule). *But cf.* 3A. ARTHUR L. CORBIN, *CORBIN ON CONTRACTS* § 604, at 626 (1960).

[U]pon acceptance of the deed of conveyance all previous agreements, written or unwritten, become “merged” in the deed and wholly discharged. This was not based on our supposed “parol evidence rule.” A deed of conveyance is what it purports to be, a conveyance, not a contract, although it may contain covenants.

*Id.* As contended *infra* at Part IV, passage of title should be ignored as a problem-solving

subsequent but totally integrated contract does not preclude collateral agreements that do not contradict the terms of the deed.<sup>87</sup> Courts have used the strained reasoning and etiology of this “collateral agreement” exception to the merger doctrine to enforce all kinds of disparate promises beyond the closing date. They include the following covenants: (1) by the purchaser to assume the seller’s mortgage;<sup>88</sup> (2) by the seller to install utilities on the property;<sup>89</sup> (3) by the purchaser to use an agent specified by the seller;<sup>90</sup> and (4) by the seller to make repairs to the property.<sup>91</sup>

Like the vague phraseology “touch and concern” in the law of restrictive covenants,<sup>92</sup> the problem with the exception for collateral agreements is that there is little agreement on what the term “collateral” means. Some courts define a collateral agreement or collateral promise as an agreement that bears no relation to title, possession, quantity, or emblements of the property being transferred.<sup>93</sup> For others it is an agreement that does not involve any matter that necessarily concerns a title agent.<sup>94</sup> A third group defines it as one that deals with subject matter that differs from that which is addressed in the deed.<sup>95</sup> Indeed, even courts within the same jurisdiction have articulated different definitions.<sup>96</sup> Consequently, courts have used the collateral promise as a tool to enforce those promises that they feel should be enforced.

Other courts and commentators rationalize the merger doctrine by using contract principles such as the doctrines of substituted contract, substituted performance, accord and satisfaction, or some other principle dealing with the

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modality and the sales contract could serve both the function of a contract (e.g., spelling out the promises to buy and sell, when title will pass, and the promises thereafter) and of a deed (acting as the instrument of recordation). Under the *present* system, however, the contract deals primarily with what has to be done before title passes and the deed *consummates* the contract—it is a conveyance that acts both as the legal evidence of title and spells out what has to be done after title passes.

<sup>87</sup> CALAMARI & PERILLO *supra* note 5, § 3.4(b) (stating that total integration does not prevent introduction of collateral agreements as long as main agreement remains uncontradicted); *see also* Teich, *supra* note 82, at 548 (noting that prior agreements collateral to a later written contract may survive merger into a later written contract).

<sup>88</sup> *E.g.*, Synder v. Roberts, 278 P.2d 348, 352 (Wash. 1955) (refusing to apply merger where it yields unjust results).

<sup>89</sup> *E.g.*, Richmond Homes, Inc. v. Lee-Mar, Inc., 251 N.E.2d 637, 640 (Ohio Ct. App. 1969).

<sup>90</sup> *E.g.*, Fitzpatrick v. Allied Contracting Co., 182 N.E.2d 183, 186 (Ill. 1962).

<sup>91</sup> *E.g.*, Wilson v. Black, 152 S.E.2d 755, 758 (Ga. Ct. App. 1966).

<sup>92</sup> *See* discussion *infra* Part II.E.

<sup>93</sup> MILTON R. FRIEDMAN, 2 CONTRACTS AND CONVEYANCES OF REAL PROPERTY § 7.2 (5th ed. 1991).

<sup>94</sup> *Id.*

<sup>95</sup> Teich, *supra* note 82, at 545 (noting this definition as the one most frequently used).

<sup>96</sup> *Id.*

discharge of contracts.<sup>97</sup> Williston argues that the merger doctrine is best explained by the rule of promissory estoppel.<sup>98</sup> Other justifications of some anti-merger results rest on the mistake, accident and fraud rules.<sup>99</sup> When language in the deed contradicts a provision in the contract, the merger result is often explained on the basis of contract modification, waiver or estoppel.<sup>100</sup> To avoid forfeiture, and occasionally the merger doctrine, courts declare that the nature of a certain clause is such that it is not normally written into a deed, and thus it is presumed that the parties had intended it to survive the closing date.<sup>101</sup> While the doctrine of merger affects virtually every real estate conveyancing transaction in the country, it is riddled with ambiguity and confusion, it is the subject of continuous litigation, and it does not provide the

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<sup>97</sup> 3A CORBIN, *supra* note 86, § 604 at 627 (asserting that the doctrine of merger acts to substitute the deed's provisions for any contrary antecedent agreements). Corbin insists that the doctrine of merger is not a form of the parol evidence rule and describes the deed as a contract rather than an instrument that the parties believe integrates their entire agreement. The doctrine is instead used to substitute the deed provisions for all antecedent agreements. "If the deed has covenants of warranty, it is upon those covenants that the grantee must sue. If it has no covenants, the grantee has his deed of conveyance, good for what it conveys; but he has nothing upon which to bring an action." *Id.* at 627; 6 CORBIN, *supra* note 86, § 1319, at 311-12 (stating that the acceptance of a deed that does not comport with bargained-for expectations "should be described as a discharge by accord and satisfaction or substituted contract and not by 'merger'").

<sup>98</sup> 7 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 923B, at 738-48 (3d ed.1961) (asserting that by knowingly accepting defects in title the purchaser waives a known right and that at the root of waiver is promissory estoppel).

<sup>99</sup> *E.g.*, *Southpointe Dev. Inc. v. Cruikshank*, 484 So. 2d 1361, 1362 (Fla. Ct. App. 1986) (holding doctrine of merger inapplicable when deed omitted contracted-for maintenance sheds when omission caused by mistake); *see Berger, supra* note 82, at 42-43 (indicating that courts have allowed rescission of contracts entered into through mutual mistake); *Ginsburg, supra* note 82, at 1198-99 n.163 (explaining that the rule that merger is inapplicable is itself inapplicable in cases of fraud because "[a] contrary rule would work the absurd result of a fraudulent vendor being insulated from legal liability by his very success in obtaining consummation of the sale") (citations omitted); *see also* 3A CORBIN, *supra* note 86, § 604 at 627 ("This doctrine of merger by deed does not purport to apply primarily to cases of mistake, whether as to title or as to other facts.").

<sup>100</sup> *Teich, supra* note 82, at 554 (explaining that courts attribute assent to the contents of an "unambiguous deed").

<sup>101</sup> *See Strike v. Trans-West Disc. Corp.*, 155 Cal. Rptr. 132, 137-39 (Cal. Ct. App. 1979) (stating that courts of equity look to the intention of the parties and courts of law may choose to do so when justice requires); *American Nat'l Self Storage, Inc. v. Lopez-Aguilar*, 521 So. 2d 303, 305-06 (Fla. Dist. Ct. App. 1988) (holding that covenants which are collateral undertakings incidental to the transfer of title should not be affected by the merger doctrine); *Hughes v. Greenville Country Club*, 322 S.E.2d 827, 828 (S.C. Ct. App. 1984) (recognizing the contrary intent exception to the merger doctrine); *accord Medeiros v. Guardian Title & Guar. Agency, Inc.*, 387 N.E.2d 644, 646 (Ohio Ct. App. 1978) (indicating that collateral promises in contracts for interests in land are "independent of the main purpose of the transaction [and] are obviously not intended to be merged in the deed").

parties with the certainty they need to structure their affairs<sup>102</sup> with a minimum degree of orderliness. For these reasons commentators have universally condemned the rule.<sup>103</sup>

In most cases the merger doctrine helps the seller. The vast majority of promises meant to survive the closing date are promises by the seller, and the typical seller wants to be released from as much liability as possible once the transaction has closed. Because application of this doctrine violates the purchaser's fair expectations, it has become common practice for the purchaser to demand a survival of liability clause or anti-merger provision in the contract. Such provisions extend the enforceability of the seller's promises beyond the closing date. Careful draftsmanship can resolve the question as to which promises should survive and which should be extinguished on the closing date. But reliance on express contract provisions, however, is an inadequate solution because the purchaser has to bargain twice: first to have the seller's promise contained in the contract and second to have the promise survive the closing date, by insisting upon anti-merger language in the contract (or to have the promise repeated in the deed). Moreover, in transactions involving residential real estate, purchasers, sellers, and even many attorneys are simply not cognizant of the merger doctrine.<sup>104</sup> In the opinion of one experienced commentator, complete resolution of the issue by means of express contract provisions is "optimistic utopia but not a practical reality."<sup>105</sup>

Without this anti-merger clause, the bargaining expectations of purchasers are often defeated and left vulnerable to unfair hardship.<sup>106</sup> Under standard

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<sup>102</sup> See Ginsburg, *supra* note 82, at 1223 ("[A]s emphasized by the review of the cases . . . there can be no reliance on the courts for consistency in either upholding or circumventing the doctrine of merger.").

<sup>103</sup> See, e.g., Berger, *supra* note 82, at 65 (remarking on the confusion and uncertainty in the case law dealing with the problem of merger or survival of real estate sales contract provisions); Teich, *supra* note 82, at 568 (advocating abolishment of the merger rule). *But see* Nepl v. Murphy, 736 N.E.2d 1174, 1180 (Ill. App. Ct. 2000) (stating that although modern courts do not favor the doctrine, Illinois has not rejected it as a result of the Illinois Supreme Court's thorough analysis in Petersen v. Hubschman Constr. Co., 389 N.E.2d 1154, 1157 (Ill. 1979), which points to the exceptions in place to protect the buyer).

<sup>104</sup> See Ginsburg, *supra* note 82, at 1222 (noting also that most contracts of sale are entered into and signed before an attorney even sees the agreement).

<sup>105</sup> *Id.* at 1223.

<sup>106</sup> See, e.g., Weiland v. Bernstein, 210 N.Y.S.2d 916, 917-18 (N.Y. App. Div. 1961) (reviewing and reversing official referee's finding that, despite false representations by the seller as to the dimension of the property sold, contract giving false dimensions was merged into the deed); see also *See* Title Ins. Co. of Minn. v. Costain Ariz., Inc., 791 P.2d 1086, 1087-92 (Ariz. Ct. App. 1990) (demonstrating through its analysis of the Arizona Supreme Court's decision in *Vaughey v. Thompson*, 387 P.2d 1019, 1021 (Ariz. 1963) that the intent of the parties in the contract can prevent an inequitable application of the doctrine of merger); *Cont'l Land Co. v. Inv. Props. Co.*, 1999 Tenn. App. LEXIS 810, at \*12, \*16-17 (Tenn. Ct. App. 1999) (citing *City of Memphis v. Moore*, 818 S.W.2d 13, 16 (Tenn. Ct.

contract principles, absent fraud or mistake, the promises of the seller that deal with title (such as the implied promise to deliver marketable title)<sup>107</sup> should nearly always terminate when title is transferred on the closing date. The purpose of the deed, after all, is to spell out the title promises of the seller-grantor and to specify any recorded exceptions to marketable title such as restrictive covenants and easements. Accordingly, the purchaser-grantee by accepting the deed usually is really accepting a substituted performance, an accord and satisfaction, or a substituted agreement.<sup>108</sup>

The following example illustrates the function of the discharge rules and the related doctrine of estoppel. Under these discharge rules and the doctrine of estoppel, if the real property being sold (Blackacre) is subject to onerous restrictions such as a recorded easement right of a neighbor to drive through the middle of Blackacre or a restrictive covenant that prohibits certain types of residences, and if the purchaser nevertheless closes title and accepts a deed without any relevant covenants of title, then the overwhelming majority of courts has held that the promise to deliver marketable title merges into the deed and the purchaser, as grantee, would have no recourse against the grantor-seller for these exceptions to marketable title.<sup>109</sup>

As to other promises in the contract, the guiding principle on survivability depends on the probable intentions and bargaining expectations of the parties as shaped by the customs and understandings in the industry as to what kinds

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App. 1991)) (recognizing fraud and mutual mistake as two exceptions to the doctrine of merger).

<sup>107</sup> See generally MADISON, ZINMAN & BENDER, *supra* note 84, at 52-69 (discussing the doctrine of marketable title, deeds, and covenants for sale).

<sup>108</sup> Conceptually speaking all three doctrines are close to one another. Under the doctrine of substituted performance, the obligation of the obligor is discharged when the purchaser-obligee accepts, in full satisfaction, a performance that differs from the original performance that was due. For example, without any cross-promises, a creditor (C) accepts the \$1000 check of the debtor (D) in full satisfaction of an unliquidated claim based on D's damage done to his automobile. See CORBIN, *supra* note 86, § 604 at 627. By contrast, under the accord and satisfaction doctrine, if C and D agree in writing that C will discharge the claim if D should deliver his automobile, worth \$1000, to C within 3 months and D delivers the automobile and C accepts it, there is an accord (the agreement) and an acceptance (the performance by D). See CALAMARI & PERILLO, *supra* note 5, § 21.4. Finally, suppose C writes to D and states, "If you promise to deliver your automobile to me within three months I will immediately treat my claim against you as immediately satisfied and discharged." If D should accept C's offer, then a substituted agreement would result. If D should fail to perform, C would have the option of recovering on the original claim or on the accord. *Id.* In the context of the doctrine of merger, all three doctrines could explain most of the cases where the courts have deemed title obligations in the contract, such as the universal promise by the seller to deliver marketable title, whether expressed or implied, to be terminated upon acceptance of the deed. In other words, the title undertakings in the deed act as a substitute or alternative performance for the title promises in the contract. See generally Berger, *supra* note 82, at 25-27 (explaining the concepts of substituted contract and merger by deed).

<sup>109</sup> Berger, *supra* note 82, at 26; Teich, *supra* note 82, at 543.

of performances take place after title passes. In making such a determination, the trier of fact should also look at the transaction-specific circumstances and ask which promises or provisions would the parties, after thoughtful consideration, have chosen to extinguish or survive on the closing date. For example, express provisions or warranties concerning the quality of new construction or existing space, or provisions dealing with the repair of improvements, should survive because these undertakings have no relationship whatsoever with the title-conveying function of the deed and obviously do not come into play until after the purchaser has taken title and possession of the property.<sup>110</sup> By contrast, the purchaser's acceptance of the deed is prima facie evidence that all the stipulations in the contract relating to title have been fulfilled.<sup>111</sup>

In 1975, in response to the longstanding criticism of the merger doctrine, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Land Transactions Act which would abolish the merger doctrine by providing that acceptance of a deed does not constitute a waiver of the rights of a buyer or secured party and does not relieve any party of the duty to perform all the obligations under the contract.<sup>112</sup> Because the merger doctrine usually favors the seller, the courts have long battled to balance the equities by enforcing contracted-for provisions, upholding bargained-for expectations, and upholding express clauses that combat the merger doctrine. Such maneuvers should not be necessary. The merger doctrine does not belong in our modern

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<sup>110</sup> There is overwhelming authority to this effect. Berger, *supra* note 82, at 53-54; *see, e.g.*, *Hudgins v. Bacon*, 321 S.E.2d 359, 362 (Ga. Ct. App. 1984) (warranty that property will be built in workmanlike manner is not merged into the deed because contract to build contains provisions that are collateral to and thus independent of title); *see also* *Neppel v. Murphy*, 736 N.E.2d 1174, 1184 (Ill. App. Ct. 2000) (concluding that a warranty as to the quality of a heating system is collateral and not fulfilled by delivery of the deed); *Bruggerman v. Jerry's Enters., Inc.*, 591 N.W.2d 705, 710 (Minn. 1999) (holding that repurchase option agreements are both conditions subsequent and collateral to the subsequently executed deed so merger doctrine does not apply). The *Bruggerman* court reasoned that because a repurchase agreement could not, by its nature, be performed prior to closing there is no basis to presume that it was expected to be included in the deed. *Bruggerman*, 591 N.W.2d at 710.

<sup>111</sup> *See* FRIEDMAN, *supra* note 93, § 7.2 at 888-89 n.8 (citing cases). The provisions involved include those dealing with the extension of a lease, acceptance of less land than was bargained for by the purchaser, and representations by the seller that there were no violations when the purchaser accepted the deed with knowledge of the violations. *Id.* Acceptance of a deed is not prima facie evidence of fulfillment in cases of fraud or mistake or in cases where the contract provisions are collateral to the deed. *Id.* at 888.

<sup>112</sup> UNIF. LAND TRANS. ACT § 1-309 (1975), 13 U.L.A. 469, 500 (1986) [hereinafter U.L.T.A.] (providing that acceptance of a deed does not in itself constitute a waiver of rights under the contract for sale). According to the official comment, this section "abolishes the doctrine of merger." *Id.* at 500. However, as of this writing, the U.L.T.A. has not been adopted by any state. *See* discussion *infra* at Part III (analyzing the purposes and successes of reform efforts).

system of conveyancing and should be abolished so that standard contract principles govern the question of which promises survive the closing date.

### B. *The Doctrine of Equitable Conversion*

The doctrine of equitable conversion presents another example where property (equity) theory has muddled the law of contracts and conveyancing. Based on the dubious maxim that “equity regards as done what ought to be done,” equitable conversion is the doctrine that

equity will, in certain cases, treat interests in land as though the land had already been converted to personal property. . . . [It] applies wherever there is created by will, contract, or court order an obligation to sell land. While that obligation continues in force, equity will generally adjudicate the parties as they would have been if the conveyance had actually been made.<sup>113</sup>

Suppose the real property being sold is a building that is damaged or destroyed during the contract period between the contract date and the closing date, when the deed is delivered to the purchaser. Equitable conversion reverses the legal

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<sup>113</sup> HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 284 (2d ed. 1948). Apparently the medieval rule as stated by Bracton (the “Bracton” rule) placed the risk of loss on the seller “because in truth, he who has not delivered a thing to the purchaser, is still himself the lord of it.” HENRICI DE BRACON, DE LEGIBUS, ET CONSUEUDINIBUS ANGLIAE ch. XXVII, 493 (Sir Travers Twiss ed., 1878-83) (explaining that “the whole danger pertains to the vendor” before delivery). In the 1801 case, *Paine v. Meller*, where houses purchased burned down after the contract was completed but before the delivery of the land, Chancellor Eldon applied the doctrine of equitable conversion to a sale of real property. 31 Eng. Rep. 1088, 1088-90 (Ch.1801). Eldon’s action, called the “Paine” rule, thereby created a rule virtually opposite in effect to the “Bracton” rule by treating the purchaser as the real owner despite the seller’s retention of possession and control over the property. In addition to the maxim quoted in the text accompanying this note, one additional explanation focused on the willingness of equity courts to grant the extraordinary remedy of specific performance to purchasers under executory contracts for the sale of real property. See Robert L. Flores, *A Comparison of the Rules and Rationales for Allocating Risks Arising In Realty Sales Using Executory Sale Contracts and Escrows*, 59 MO. L. REV. 307, 345-47 (1994) [hereinafter Flores II]. Also, the equity courts needed to ascertain whether a decedent’s property was in the nature of personal property or real property on the date of the testator’s death for purposes of determining how and to whom the property would pass under the will. *Id.* As is often the case with maxims, the rule states a conclusion without providing a reason for the conclusion. See Harlan F. Stone, *Equitable Conversion by Contract*, 13 COLUM. L. REV. 369, 388 (1913) (“Most of the difficulties and perplexities which attend the disposition of rights arising under contracts from the sale of land would never have risen had this fiction [equitable conversion] never been invented.”); see also, Franklin J. Feilmeyer, Note, *A Rescission Approach to Vendor’s Damages After Forfeiture of an Installment Real Estate Contract*, 74 IOWA L. REV. 901, 915-16 (1989) (analyzing *Rector v. Alcorn*, 241 N.W.2d 196 (Iowa 1976), wherein the court chose not to grant an unreasonable windfall to the seller in the case of fire loss).



positions of the parties as soon as the contract is signed by the purchaser. Under this doctrine, the seller retains the deed and the naked legal title to the property along with the legal right to possession as security for its liquidated claim against the purchaser for the balance of the purchase price, which, like any other contract claim, is in the nature of personal property. Conversely, the purchaser becomes the beneficial owner with the equitable title to the property, which is in the nature of real property. Some historians refer to this result as the *Paine* rule.<sup>114</sup>

The historic splitting of legal and equitable title by the equity courts under the doctrine of equitable conversion allowed courts to ascertain how the interests of a seller and purchaser should pass under a will where the testator intended to distribute real and personal property separately to different legatees, in the event that the property owned by the testator on the date of his death was to be sold under an executory contract. If the purchaser did not breach the contract, then the seller's interest would pass as personalty and the purchaser's interest would pass as realty. On the other hand, if on the date of the seller-testator's death the contract had been breached, the conversion would be cancelled. Then the seller's interest would revert to its original status as real property and pass to the legatee or legatees entitled to take the real property under the will. Conversely, had the contract remained executory and not been closed, a non-defaulting buyer's interest would be deemed to be in the nature of real property and on the date of the buyer's death, the interest would pass to those legatees, if any, who were entitled to take the real property.<sup>115</sup>

Furthermore, the *Paine* rule better protects the purchaser because the purchaser is deemed to be the real owner of the real property. This result

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<sup>114</sup> *Paine*, 31 Eng. Rep. at 1089. In that case, the Lord Chancellor Eldon analogized the situation to that of a man who signs a contract to buy a house and land appropriated to the London docks. *Id.* When the house burned, the land increased in value because the house no longer needed to be torn down for the project. *Id.* In such a case, "it would be impossible to say to the purchaser, willing to take the land without the house, because the land is much more valuable . . . that he should not have it." *Id.*

<sup>115</sup> *Id.*; see also *Clapp v. Tower*, 93 N.W. 862, 863-64 (N.D. 1903) (adopting the rule that decedent-sellers maintain an equitable ownership of the purchase price money during the executory sale of land). Suppose under the seller's will A is supposed to get all the realty and B all the personalty. Does this mean that under the conversion rules, the intentions of the testator, O, could be thwarted on a chance happening over which the testator has no control? That is, if the purchaser defaults before O dies, the property goes to A, and if there is no default, it passes to B? Probably not. If a default should occur, the seller can always change his or her will while the seller is alive. Some interesting results could occur under these conversion rules. For example, suppose the buyer died owing some money to the seller and under the buyer's will X was to receive all his real property and Y was to receive all the decedent's personal property. Since the latter includes not just money belonging to the buyer but also *any money claims against the buyer* on the date of his death, the legatee X would end up owning the real estate even though Y would wind up paying the balance of the purchase price

justifies and legitimizes the equitable remedy of specific performance that a purchaser is entitled to in the event the seller refuses—without justification—to perform a contract for the sale of realty. The *Paine* rule also allows a seller under an installment contract to retain the legal title to and legal possession of the property being sold, in the form of a deed, as security for the purchaser's promise to pay the balance of the purchase price over the installment period. This is analogous to the title theory of mortgage law adopted in some jurisdictions that permits a mortgagee to retain the legal title and legal right to possession as security for the mortgagor's promise to repay the mortgage indebtedness.<sup>116</sup>

The *Paine* rule, however, makes little sense in the context of allocating a casualty loss between the vendor and purchaser if the property should be damaged or destroyed during the hiatus between the date of the agreement and the date on which the title is scheduled to pass to the purchaser. During the contract period, the purchaser must bear the risk of loss because the purchaser is regarded as the “real” owner of the property, even though the purchaser ordinarily<sup>117</sup> is not allowed to obtain possession and cannot effectively mortgage, lease, or sell the property until he or she acquires the legal title on the closing date. Consequently, under the *Paine* rule, the purchaser becomes the beneficial owner but winds up with the burdens—but not the benefits—of ownership. Why then should the purchaser bear the risk of loss if the seller is the party who benefits from the property and controls the property during the contract period? Should not liability follow control? Certainly the seller, as the party in control, is in a better position than the purchaser to protect the property from a casualty loss.

Liability follows control in other areas of the law such as tort liability.<sup>118</sup> In one case, a vendor was negligent during the contract period by not repairing or allowing the purchaser to repair a small crack in the arch of a stone porch entrance. The crack deepened and the porch collapsed prior to the closing of the title. In that case, *Rappaport v. Savitz*, the court refused to follow the

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<sup>116</sup> See *Moses v. Johnson*, 7 So. 146, 147 (Ala. 1889) (holding that “[w]hen a vendor of real estate enters into an executory agreement to convey title on the payment of the purchase money, he sustains, in substance, the same relation to the vendee as a mortgagee does to a mortgagor”). For a discussion of the title versus lien theories of mortgage law, see generally MADISON, ZINMAN & BENDER, *supra* note 84, at 450-51.

<sup>117</sup> Note that in the case of an installment land contract which is used to finance the purchase of a farm or other real estate business, the seller, who retains the legal title and legal right to possession, ordinarily would allow the purchaser to go into possession during the installment period so that the purchaser will be able to earn the income it will need to fund the balance of the purchase price payments over the installment period.

<sup>118</sup> See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 34, at 208 (5th ed. 1984) (providing that those who control dangerous instruments must exercise a great amount of care because of the great risk they pose); see, e.g., *Wroth v. McKinney*, 373 P.2d 216, 217-19 (Kan. 1962) (explaining that one in possession of a gun must exercise the highest degree of care).

majority rule and found that the seller had to bear the loss based on the "necessary exception where damage results from the fault of the vendor."<sup>119</sup> The court held that the court below erred when it held that the appellant's rights were extinguished as a matter of law by merger. As part of its reasoning, the court observed that if the vendor retains possession it has a duty of care to reasonably protect the property, noting that "[a]s a practical matter, it would seem reasonable to suppose that the bargain of the parties was for the land as it was at the time of contract, and not as it is after deterioration through lack of care."<sup>120</sup>

The majority rule based on equitable conversion can produce unfair results that are contrary to the probable intentions and bargaining expectations of the parties. For example in the well-known case of *Ross v. Bumstead*,<sup>121</sup> the vendor-plaintiff entered into a contract with the vendee-defendant for the sale of land containing a date orchard as well as the warehouses for packing and storing the dates. Eight days after the parties signed the agreement the buildings and contents burned down through no fault of either party. After the vendor refused to make an adjustment in the purchase price the defendant stopped payment on its \$5000 check. As a result, the vendor sued for expectancy damages. Under the terms of the installment contract the defendant-purchaser was not allowed into possession until the closing date<sup>122</sup> and the vendor had been in possession when the fire occurred. Nevertheless, the Supreme Court of Arizona relied on what it considered the majority rule of equitable conversion to hold the purchaser liable.<sup>123</sup>

Conversely, in *Capital Savings & Loan Association v. Convey*,<sup>124</sup> the

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<sup>119</sup> 220 A.2d 401, 403 (Pa. Super. Ct. 1966). This case is examined in Flores II, *supra* note 113, at 328-30 (stressing that the court reasoned that the parties probably intended that the seller, by remaining in possession, retained a duty of care).

<sup>120</sup> *Rappaport*, 220 A.2d at 403-04 (stating that the implied provision to exercise reasonable care of the premises was collateral to the title and therefore not merged into the deed); Flores II, *supra* note 113, at 329.

<sup>121</sup> 173 P.2d 765, 767 (Ariz. 1946) (affirming the *Paine* rule whereby the risk of loss falls on the vendee). The court also acknowledged the minority rule that maintains that a vendor who could not acquire all the land he bargained for because of destruction should not bear the loss. *Id.*

<sup>122</sup> On the scheduled closing date, however, the purchaser was supposed to be credited retroactively with the net income from the property during the period between the execution of the agreement and the closing of title. *Id.* at 766.

<sup>123</sup> *Id.* at 767 (citing *Paine* as the origin of the majority rule which the court stated had been followed by a long line of cases in England and America).

<sup>124</sup> 27 P.2d 136, 138 (1933); *accord* *Anderson v. Yaworski*, 181 A. 205, 209 (Conn. 1935) (allowing plaintiff to recover money because seller could not perform duties of the real estate contract); *Durham v. McCready*, 151 A. 544 (Me. 1930) (supporting the Massachusetts rule established in *Thompson v. Gould*, 37 Mass. (20 Pick.) 134 (1838) while recognizing the weight of authority supporting the contrary rule); *Libman v. Levenson*, 128 N.E. 13, 13-14 (Mass. 1920) (requiring seller to reimburse buyer part of sale price because a

Supreme Court of Washington held a vendor responsible for a loss even though the purchaser was in possession and had known about the defect prior to the damage but had neither said nor done anything about the problem. In *Capital Savings & Loan*, a vendor sold a cold storage warehouse to the defendant-vendee, and an addition to the main building was not in compliance with the local carrying-load ordinance. Subsequently, while the purchaser was in possession of the warehouse, the non-conforming addition collapsed. In holding for the defendant-vendee, the court rejected the *Paine* Rule and held that the vendor had to assume the risk of loss. Under the guise of a contract approach,<sup>125</sup> the court adopted the minority view, the so-called Massachusetts rule, that purchasers should not be liable for a loss until they get what they bargained for—namely the legal title to the property in the form of a deed.<sup>126</sup>

So the majority rule dictated that the purchaser in *Ross* bore the risk of loss even though the seller had been in possession and in control of the premises, while the minority rule held the seller in *Capital Savings & Loan* responsible even though the purchaser had been in possession and because of its inaction had indirectly caused the loss to the property. Both of these cases concerned seller financing and the question of who should bear the risk of loss during the contract period was a meaningful one, because both situations involved rather lengthy installment periods. Had the parties taken the time to consider the question thoughtfully, they most probably would have assigned the risk to the party in possession who was in control at the time of the damage to, or the destruction of, the property.

In contrast to the Massachusetts rule, the Uniform Vendor and Purchaser Risk Act (hereinafter “Risk Act”) follows a true contract approach by assigning the risk of loss to the party with the legal title and/or in possession, who presumably has control over the property.<sup>127</sup> Placing the risk of loss on

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retaining wall on the property collapsed five days before property was to change hands); *Skelly Oil Co. v. Ashmore*, 365 S.W.2d 582, 584-90 (Mo. 1963) (ordering specific performance of a contract for the sale of real estate while ordering that the buyer’s price be reduced to account for insurance proceeds received by the seller after a building on the property burned down);. *But cf.* *Bleckley v. Langston*, 143 S.E.2d 671, 674 (Ga. Ct. App. 1965) (holding purchasers must bear loss caused by windstorm damage even though vendors were in temporary possession); *Duhon v. Dugas*, 407 So. 2d 1334 (La. Ct. App. 1981) (illustrating an exception to the minority approach to the doctrine of equitable conversion that occurs when purchaser of a movable house is found in possession and sale is completed without a deed prior to damage, and hence purchaser bears the risk of loss).

<sup>125</sup> In the seminal case of *Thompson v. Gould*, the seller’s house was destroyed by fire before the deed was delivered and the court rejected the *Paine* rule by holding that ownership of realty means legal, and not equitable, title. 37 Mass. 134 (1838). In *Thompson*, the seller was unable to perform because the ownership had not been transferred prior to the destruction of the subject matter of the contract. Accordingly, the contract was cancelled because of the seller’s failure of consideration. *Id.* at 139.

<sup>126</sup> *Capital Savings & Loan*, 27 P.2d. at 138.

<sup>127</sup> UNIF. VENDOR AND PURCHASER RISK ACT § 1(a), 14 U.L.A. 471 (1935) (Master ed.

the party in possession who presumably has the day-to-day control over the property conforms to the probable intentions and bargaining expectations of the parties. Regardless of whether it is the vendor or purchaser, the party in possession and control of the property is usually in the best position to protect the property against loss. Moreover, the party who enjoys the fruits of possession should, as a matter of fairness and symmetry, bear the risk of loss and other burdens of possession.<sup>128</sup> Although thirteen states, including New York, have adopted the Risk Act without substantial change, it has been pretty much ignored since the 1960s.<sup>129</sup>

While the result under the majority rule can be changed by means of an express provision in the contract, such risk re-allocation to the seller by agreement (like overturning the merger doctrine by written agreement)<sup>130</sup> can be subject to dispute.<sup>131</sup> Ordinarily, the vendor in possession will obtain casualty insurance until the closing date. Suppose, in reliance on the vendor's policy, the purchaser fails to obtain insurance even though the purchaser bears the risk of loss. This is risky because authorities are divided on whether the purchaser, upon payment of the balance of the purchaser price, can obtain the vendor's insurance proceeds less reimbursement for the vendor's payment of the insurance premiums.<sup>132</sup> Another pitfall is that a vendor who allows the

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1990) [hereinafter RISK ACT] (providing that if "all or a material part [of the subject matter] is destroyed without fault of the purchaser . . . the vendor cannot enforce the contract and the purchaser is entitled to recover any portion of the price he has paid.") This position was also adopted by U.L.T.A., *supra* note 7, § 2-406 cmt.1 at 547 (rejecting the doctrine of equitable conversion to state that risk of loss or taking by eminent domain passes to the buyer only if the buyer has possession or if the conveyance instrument has been delivered to him).

<sup>128</sup> See Flores II, *supra* note 113, at 333 (discussing "economic analysis of law" and contending that by imposing loss on party whose conduct contributes to the loss encourages loss avoidance); see also *Appleton Elec. Co. v. Rogers*, 228 N.W. 505, 508 (Wis. 1930).

<sup>129</sup> See UNIF. VENDOR AND PURCHASER ACT, 14 U.L.A. at 245 (Supp. 2001) (noting that since 1963 only three states, Texas, New Mexico and Nevada, have enacted the Risk Act).

<sup>130</sup> See *supra* at Part II.A. (discussing the history and implications of the much-criticized doctrine of merger).

<sup>131</sup> In *Pellegrino v. Giuliani*, a New York state court took slight notice of the fact that there was no provision in the contract "with reference to a loss due to any other cause." 193 N.Y.S. 258 (N.Y. Sup. Ct. 1922). It then virtually ignored the language in the contract which provided that "the risk of loss or damage to said premises by fire until the delivery of the deed is assumed by the seller" and held that the vendee had to bear the loss to the building on the land caused by a heavy windstorm because "according to the law of this state the vendee, whether he has taken possession of the premises or not, must stand the loss." *Id.* at 258-59.

<sup>132</sup> Compare *Appleton Elec. Co. v. Rogers*, 228 N.W. 505, 508 (Wis. 1930) (vendor during the executory phase of contract for sale of property bore fire damage loss and therefore had no obligation to share insurance proceeds with purchaser) with *Dubin Paper Co. v. Ins. Co. of N. Am.*, 63 A.2d 85, 96-97 (Pa. 1949) (purchaser allowed to share proceeds under "constructive trust" doctrine); see also James M. Fischer, *The Presence of*

purchaser to go into possession may lose insurance protection because the transfer of possession constitutes a change in vendor's "interest" in a majority of jurisdictions, and consequently this may void the policy by depriving the vendor-insured of its status as the sole and unconditional owner of the property.<sup>133</sup>

### C. *Purchaser's Right to Damages After the Closing Date*

Another dysfunctional result of property law's formalism occurs when a grantee seeks to recover damages against a grantor for breaching the covenant of seisin or the covenant of warranty in the deed transferred by the seller to the purchaser on the closing date. Standard contract principles dictate that if the seller commits a material breach of the contract before the closing date, the buyer can sue the seller for expectancy (general) damages, which may exceed the purchase price (especially in an inflationary economy). By contrast, if the breach occurs after the closing of title, the seller, as grantor-covenantor, can only be sued for damages equal to the purchase price plus accrued interest.<sup>134</sup> This disparity in result is more pronounced in the case of an installment land contract as compared to the ordinary contract of sale because the installment period between the contract date and closing date can last for a number of years, depending on how long the seller is willing to finance the buyer's purchase of the property.<sup>135</sup>

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*Insurance and the Legal Allocation of Risk*, 2 CONN. INS. L. J. 1, 27 n.107 (1996) (indicating that the inequity of allowing seller to retain insurance contract proceeds can be redressed by requiring seller to hold the proceeds in a constructive trust for the buyer).

<sup>133</sup> Fischer, *supra* note 132 at 27 n.107 (citing *Long v. Keller*, 163 Cal. Rptr. 532 (Cal. Ct. App. 1980)).

<sup>134</sup> See, e.g., *Duvall v. Craig*, 15 U.S. 45, 62 n.3 (1817) (citing *Staats v. Ten Eyck's Executors*, 3 Caines 111 (N.Y. Sup. Ct. 1805) (noting that Pennsylvania and New York courts have held that a grantee is entitled to purchase-money and interest from the time of purchase)); *Pitcher v. Livingston*, 4 Johns 1, 11 (N.Y. Sup. Ct. 1809) (holding that a plaintiff in an action for breach of covenant of seisin can recover consideration money paid with interest and the costs of ejectment); *Bender v. Fromberger*, 4 Dall. 441, 445 (Pa. Sup. Ct. 1806) (plaintiff not entitled to recover value of improvements he made after purchase because warranty applies only to value of land at time of purchase); accord *Bibb v. Freeman*, 59 Ala. 612, 619 (1877) (illustrating that generally the damages for breaching a covenant of seisin are the purchase price plus interest).

<sup>135</sup> Compare *Lurette v. Bank of Italy Na'l Trust & Sav. Ass'n* 42 F.2d 9 (9th Cir. 1930). In *Lurette*, a vendor entered into a seven-year installment land contract with plaintiff-purchasers who paid a substantial deposit and made monthly payments for two years until they discovered that an adverse homestead claim had been filed with the Land Office at the U.S. Department of Interior. Even though the adverse claimant was losing at the preliminary level, the plaintiffs requested that their payments be suspended pending the outcome of the proceedings, or in the alternative, that the contract be rescinded and their moneys returned to them. The Ninth Circuit denied the requested relief and stated that "[t]he rule has long been settled in California that there can be no rescission by a vendee of an executory contract of sale merely because of lack of title in the vendor prior to the date

Returning to our hypothetical at the beginning of Part II, assume that Pat Purchaser and Olin Owner agree to a five-year installment land contract and that Olin defaults by not delivering marketable title on the closing date. Further assume that Pat has paid the full purchase price of \$100,000, and that prices for comparable parcels have doubled over the five-year installment period. Under standard contract principles, if Olin is solvent then Pat could make himself whole again by suing Olin for general damages based on the loss of bargain in the amount of \$200,000.<sup>136</sup> By contrast, had the vendor financed Pat's purchase of the land by means of a five-year purchase money mortgage, Pat would have immediately received the title, and if the deed were a warranty deed, Pat's only recourse against the vendor for failure of title would be based on the covenants of seisin and warranty in the deed. Assuming that Pat paid the entire purchase money indebtedness at the end of the five-year installment period, his maximum recovery would be limited to the consideration paid (\$100,000) plus accrued interest. Assuming an average interest rate of five percent, compounded annually, the ceiling on damages for recovery by a covenantee under property law would be the \$100,000 plus accrued interest of \$27,628 for a total of \$127,628,<sup>137</sup> as compared to the \$200,000 damages recovery under standard contract principles.

The rule gained acceptance in an era when the frontier of this country was expanding and land values skyrocketed. During that era, one court described it as follows:

A rule that the damages should be the actual loss at the time of eviction,

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when performance is due." *Id.* at 10. The *Luette* vendor did not do anything to render the title unmarketable, so the purchaser could not cancel the contract under the doctrine of anticipatory breach. Furthermore, the purchasers were not able to suspend their payments because they could not argue that prospective performance by the vendor was unlikely. Under the laxer standard proposed by Section 2-403 of the Uniform Land Transactions Act, however, the possible title defect would have allowed the purchaser to demand an adequate assurance of performance.

<sup>136</sup> See *Seidlek v. Bradley*, 142 A. 914 (Pa. 1928), reprinted in 68 A.L.R. 134, 137 (1930) (holding that vendee may recover damages equal to loss of bargain if contract is in writing and vendor acts fraudulently or in bad faith); CALAMARI & PERILLO, *supra* note 5, § 14.30 (reporting that most jurisdictions that follow the so-called American rule allow the vendee to recover her full loss of bargain together with consequential damages pursuant to general contract law principles); see also CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 185 (1935) (stating that expectation damages are recoverable in a failure of title case).

<sup>137</sup> With the exception of Connecticut, Massachusetts, Vermont and Maine, virtually all courts in America restrict liability for failure of title to the amount of consideration paid to the grantor, with interest from the time of the loss, together with any expenses incurred by the grantee in defending the title. MCCORMICK, *supra* note 136, § 185; see, e.g., *North v. Brittain*, 291 S.W. 1071 (Tenn. 1927) (holding that damages for breach of covenant of seisin cannot exceed the value of consideration with interest). Some jurisdictions have adopted the rule by statute. E.g., CAL.CIV. CODE §§ 3304, 3305 (Deering 2000 & Supp. 2001).

would work great injustice, and prevent the transfer of property in Pennsylvania. Our turnpikes, canals, and railroads have produced so many improvements, and such sudden changes in the value of property, that any other rule would produce incalculable mischief and ruin.<sup>138</sup>

Since this historic rationale no longer rings true, why not allow the grantee the same loss of bargain damages that a vendee would be entitled to under the same circumstances? Indeed, the reliance factor is probably stronger for a grantee who has lived on, worked on, or improved the land, believing that he or she has full ownership, than it is for a vendee who has yet to obtain the full legal title.

Some might contend that the ceiling on damages discussed above is not a problem for the individual grantees. Such grantees can protect themselves by obtaining a so-called market value endorsement to the standard American Land Title Association (“ALTA”) Owner’s Policy, which guarantees a payment equal to the market value of the property at the time the claim is made. This endorsement is only available in some jurisdictions such as New York. In some states, buyers rely not on title insurance but instead on title opinions of attorneys and abstract companies for their title protection.

#### D. *The Definitional Distinction Between Present and Future Covenants Can Cause Absurd Results*

The formalistic distinction under property theory between present and future covenants in a warranty deed can lead to haphazard results for grantees in the same chain of title. Under this legal appendage to the deed, a grantor who promises that he has good title may provide protection to a grantee who does not need it. At the same time, another grantee who needs protection will not receive it even though both grantees represent links in the same chain of title. Except for title insurance,<sup>139</sup> the highest degree of title protection for a buyer under our recording statute/title insurance system is the general warranty deed. This deed provides that the grantor, who previously was the seller prior to the closing of title, covenants to the grantee, who previously was the buyer, that (1) the grantor owns the interest that he or she is purporting to convey on the closing date (*covenant of seisin, or right to convey*), (2) there are no pre-existing liens, use restrictions or other encumbrances reducing the value of the land on the closing date (*covenant against encumbrances*), (3) after the closing

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<sup>138</sup> *Brown v. Dickerson*, 12 Pa. 372, 375 (1849); see also C. Dent Bostic, *Land Title Registration: An English Solution to an American Problem*, 63 IND. L.J. 55, 66-67 n.32 (1987) (reporting that an overwhelming majority of states have ruled damages are limited to purchase price or a proportionate share thereof for a partial breach, plus interest, because the burden it creates on the warrantor is otherwise too great).

<sup>139</sup> These covenants of title are important not just to grantees without title insurance but to title companies as well, who, under the terms of the standard ALTA policy, are subrogated to any rights the grantee-insured has against the grantor. See 1987 AMERICAN LAND TITLE ASSOCIATION OWNER’S POLICY § 13(a).



date, the grantee will not be evicted by someone with a superior or so-called paramount claim, and (4) the grantor will indemnify the grantee in the event that such an eviction should occur (*covenant of warranty* or *covenant of quiet enjoyment*).

Under common law dogma, covenants triggered by future events such as eviction of the grantee are called future (*in futuro*) covenants that run with the land and thereby benefit remote purchaser-vendees. By contrast, certain covenants, such as the covenant of seisin and the covenant against encumbrances, are called present (*in praesenti*) covenants because they can only be breached when the deed is presently delivered on the closing date. In other words, on the closing date, the grantor either has good title that is unencumbered or she does not. In most jurisdictions, such covenants do not run with the land. Moreover, in the past, contract claims of this nature characterized as choses in action were non-assignable. Hence the benefit of the covenant has been deemed to be personal in nature to the immediate grantee and cannot be transferred by implication to a subsequent party.<sup>140</sup> The formalistic rationale behind the property theory rule, which is termed “the American rule,” is that once the covenant is breached there is nothing of the covenant left over to pass to a subsequent purchaser-grantee.

By contrast, common law courts in England and in a minority of states apply a contract approach, the “English rule,” to allow the benefit of the present covenant to pass down the chain of title.<sup>141</sup> The contract rationale is that the rule prohibiting the assignment of choses in action was lost in history<sup>142</sup> and the benefit of the covenant is in the nature of a chose in action that by

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<sup>140</sup> *E.g.*, *Mitchell v. Warner*, 5 Conn. 498, 503 (Conn. 1825) (reasoning that a covenant that is either broken instantaneously on the delivery of the deed or never broken at all is a personal covenant and therefore does not run with the land); *see also* Bostick, *supra* note 138, at 111 n.31 (discussing that once a present covenant is breached it becomes a chose in action which is non-assignable); Charles E. Goulden, Comment, *Covenants of Title Running with the Land in California*, 49 CAL. L. REV. 931, 945 (1961) (arguing that allowing covenants of title to run with the land would benefit grantees and could be accomplished if such covenants were assigned by operation of deed); Leonard Spitale, Comment, *Covenants for Title—Protection Afforded Buyer of Realty in Florida*, 7 U. MIAMI L. REV. 378 (1953) (defining the American rule).

<sup>141</sup> *E.g.*, *Proffit v. Isley*, 683 S.W.2d 243, 244 (stating that remote grantee must seek recourse against his immediate grantor who in turn can go after his own grantor) (Ark. Ct. App. 1985); *Conn. Attorney’s Title Ins. Co. v. Fortner*, No. 88-353650, 1991 Conn. Super. LEXIS 2814, at \*1-2 (Conn. Super. Ct. 1991) (buyer’s right of action for breach of covenant against encumbrances not extinguished by buyer’s act of quitclaiming to himself and wife as joint tenants); *Schofield v. Iowa Homestead Co.*, 32 Iowa 317, 319 (1871) (supporting the English rule and criticizing the American rule as based on “technical scruple”). Some jurisdictions have codified the English rule. *E.g.*, COLO. REV. STAT. § 118, art.1-21 (1953).

<sup>142</sup> CRIBBET & JOHNSON, *supra* note 14, at 297 (citation omitted) (“The non-assignability of choses in action has largely disappeared into the limbo it so richly deserves . . . [as] England and some American states have abandoned this ‘technical scruple.’”).

implication is assigned to the next grantee when the title passes down the chain of title. Furthermore, the bargained-for purpose of the covenant is to provide protection for a grantee who needs it, regardless of whether the grantee is remote or immediate

So under the American rule we end up with the absurd result that an uninjured immediate grantee can use the covenant to sue the grantor (albeit for only nominal damages) while an injured remote vendee has no recourse under the covenant.<sup>143</sup> In the words of Chancellor Kent, however, “[The subsequent vendee] is the most interested, and the most fit person to claim the indemnity secured by [the covenants], for the compensation belongs to him as the last purchaser and the first sufferer.”<sup>144</sup> In fact, the net result under property law (American rule) might be that no one gets the benefit of the covenant. An analogous argument can be made to support the notion that the contract approach justifies the running of restrictive covenants without having to resort to the strained concept called privity.<sup>145</sup>

The Uniform Land Transactions Act Section 2-312 provides that, absent language to the contrary, all warranties of title, including present covenants such as the covenant of seisin and the covenant against encumbrances, run with the land. It might be contended that most buyers obtain title insurance or some other title protection so a remote grantee would still be protected if it does not get the benefit of the covenant. The premium costs of title insurance are reduced, however, by the fact that title companies—under stipulations in the standard ALTA owner’s policy—have a right of subrogation once they pay a claim. Therefore, if under the American rule an injured party has title insurance protection but has no right to sue the grantor who gave the covenant, the title company, which steps into the shoes of the insured, gets no benefit from its right of subrogation, and premium costs for all policy-holders would increase.

#### E. *Contract Approach to the Law of Servitudes*

Nowhere in the law of contracts and conveyancing is the confusion caused by the conflict between property and contract theories more pronounced than in the law of servitudes, which governs land use restrictions. Common types of servitudes include restrictive covenants,<sup>146</sup> equitable servitudes,<sup>147</sup> and

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<sup>143</sup> *Id.* at 319; *see also* Schofield, 32 Iowa at 319 (stating that the American rule “will operate oppressively in all cases where land has been subsequently conveyed by the grantee”). However, if, as is likely, the original grantor gave a general warranty deed, such deed would also contain the covenant of warranty which does run with the land. Hence, a remote grantee who is subsequently evicted could recover against the original grantor for the failure of title.

<sup>144</sup> 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 472 (William M. Lacy ed., 1889).

<sup>145</sup> *See* discussion *infra* at Part II.E (illustrating the needless complexities of the law of servitudes).

<sup>146</sup> A restrictive covenant is a promise made by one landowner to another to use or not to

negative easements.<sup>148</sup> As a matter of substance over form, all these servitudes look alike and serve the same function. Consider the following example as an illustration.

Party A, by means of a general warranty deed, conveys to B the fee simple title of a tract of land called Blackacre. Blackacre is a part of a subdivision that A owns called Whiteacre. B promises on behalf of himself, his heirs, and assigns that he shall not use Blackacre for nonresidential purposes. B then conveys Blackacre to C and A conveys Whiteacre to X. Shortly thereafter A (or X) discovers that B or C (B's successor) is using the land for commercial purposes. A could have obtained essentially the same protection by means of a restrictive covenant from B, or by means of a promise from B that would be enforceable only as an equitable servitude. Theoretically, the same restriction could be created through a negative easement agreement from B to A, or by means of a fee simple determinable or a fee simple on condition from A to B. In practice, however, such easements are difficult to use.<sup>149</sup> Furthermore, a

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use one's land in a specified way, and that promise is enforceable both at law and at equity and not only against the owner who made the promise and by the owner to whom the promise was made, but also against and by their respective successors. Typical examples include an affirmative agreement by a landowner to maintain a fence on the border of an adjacent parcel owned by the covenantee, and a negative agreement by a landowner not to pollute a stream running through adjacent land owned by the covenantee. The land being burdened with the restriction is called the servient estate and the land being benefited is called the dominant estate. See JOSEPH W. SINGER, PROPERTY LAW—RULES, POLICIES, AND PRACTICES 76-79 (2d ed. 1997); see also RESTATEMENT (THIRD) OF PROPERTY § 1.3 (2000) (defining "restrictive covenant").

<sup>147</sup> If there is no legal remedy available to the promisee under a restrictive covenant because of the stringent privity requirements, the promise nevertheless may be enforceable at equity by means of injunctive relief, in which event the promise is referred to as an equitable servitude. SINGER, *supra* note 146, at 435-37; see also RESTATEMENT (THIRD) OF PROPERTY § 1.4 (2000) (eliminating the distinction between "real covenants" and "equitable servitudes" by referring to both as "covenants that run with the land"). Historically, real covenants required horizontal privity whereas "equitable servitudes" were enforced in courts of equity if the remote grantee had notice of the covenant. RESTATEMENT (THIRD) OF PROPERTY § 1.4 cmt. a (2000).

<sup>148</sup> An easement is a right to enter and use someone else's land in a special manner, as for example, an affirmative agreement allowing an adjacent landowner a right of way to gain access to a public street, or a negative agreement to a height restriction on one's land to protect an adjacent owner's ocean view. Easements by nature are usually permanent and not revocable. SINGER, *supra* note 146, at 409-12; see also RESTATEMENT (THIRD) OF PROPERTY § 1.2 (2000). The Restatement considers negative easements to be restrictive covenants and provides that easements generally "create a nonpossessory right to enter or use land." *Id.*

<sup>149</sup> In many jurisdictions negative easements are difficult to use. Historically, at common law negative easements could only be used for obtaining light, air, lateral support, and the flow of an artificial stream. American courts have recognized many new types of negative easements: historic preservation (preventing destruction or alteration of historically

qualified fee simple does not encumber the title; rather, it is part of the title and not classified a servitude.<sup>150</sup> Accordingly, commentators have contended for years that it makes no sense to apply different legal rules to what is essentially the same legal animal.<sup>151</sup>

In most cases, the promise by B to A will be structured as a restrictive covenant in the deed from A to B and could be enforced at both law and equity. Under traditional servitudes law, a covenant so structured would bind B's successors and assigns (such as C) only if the following obtained: (1) the covenant by B touches and concerns the land; (2) the original parties to the covenant (A and B) intend that both the benefit and burden of the covenant run with the land; (3) there is horizontal privity of estate between A and B, and for the benefit to run to a subsequent party such as X there must be vertical privity between X and the original covenantee A, and for the covenant to bind C there must be vertical privity between C and the original covenantor B; (4) any purchaser of the servient estate (Blackacre) such as C must have notice of the restriction before paying value for the land; and (5) the covenant must be in writing. If the foregoing privity requirements are not met, the covenant could still be enforceable as an equitable servitude, in which event the covenantee could not get money damages but nevertheless could ask for injunctive relief from a court sitting at equity. Finally, covenants and equitable servitudes that cease to benefit the dominant estate can be terminated under the changed conditions doctrine. Traditionally, the changed-conditions doctrine does not apply to negative easements, and different requirements must be met to create them.

Historically, English and American law on servitudes has vacillated between

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important buildings and structures); conservation easements (preventing land development to protect the environment and preserve local aesthetics and habitats); and solar easements (protecting the availability of sunlight for solar energy. SINGER, *supra* note 146, at 412. Even so, the judicial bias against negative easements is still prevalent. *Id.* (explaining that the limitation on negative easements intends to promote the alienability of land).

<sup>150</sup> The same use restriction could be created by means of a fee simple determinable or fee simple on condition, as for example, by having A convey title to Blackacre to B "so long as Blackacre is used for residential purposes" or "on the condition that Blackacre never be used for nonresidential purposes," respectively. But these definitions of title are not "servitudes" as defined in the Restatement inasmuch as they are not legal devices that run with the land. See RESTATEMENT (THIRD) OF PROPERTY § 1.1 (2000) (defining servitude as "a legal device that creates a right or an obligation that runs with the land" and that "passes automatically to successive owners or occupiers of the land).

<sup>151</sup> See generally Susan F. French, *Servitude Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification*, 73 CORNELL L. REV. 928 (1988) (advocating a reform in servitude law to merge the different types of servitudes); see also Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1179, 1182 (1982) (arguing that easements, real covenants, and equitable servitudes should be merged into one concept); Michael J. Sweeney, Note, *The Changing Role of Private Land Restrictions: Reforming Servitude Law*, 64 FORDHAM L. REV. 661 (1995) (making the case for why reform is needed after tracing the history of servitudes law).

property and contract theories. Easements arose out of the English lord of the manor's grant of rights, such as pasturage and wood gathering, to his subjects. Such agreements represented exceptions to the lord's right to exclude others from his lands. In those days easements included only rights in someone else's land. Likewise, courts prohibited the use of new negative easements. Consequently, landowners started to use covenants and agreements among themselves to impose land use restrictions. This was done by creating both affirmative duties to act on one's own land and new negative easements by means of real covenants and equitable servitudes that depended more on contract law than property law.<sup>152</sup>

The current vehicle for servitude law reform is Restatement (Third) of Property.<sup>153</sup> This effort at reform was precipitated by an exchange of ideas that took place at a symposium on the law of servitudes held at the University of Southern California Law School in 1982 and that was attended and/or commented upon by academics and others including Professors Uriel Reichman,<sup>154</sup> Susan French,<sup>155</sup> and Richard Epstein.<sup>156</sup> Any detailed discussion of these reform efforts is beyond the scope of this paper; however, the respective positions taken by these commentators can be briefly summarized. Virtually all the commentators agreed that simplification of the law makes sense in light of the functional equivalence of the various types of servitudes. At the symposium, Professor Reichman made an excellent case for simplification and unification of the law governing the creation and enforcement of servitudes based on history and policy considerations.<sup>157</sup> So

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<sup>152</sup> See SINGER, *supra* note 146, at 409, 434-35. Prior to this development, negative easements were only those that were characterized as "natural rights" and did not require any specific agreement between neighboring owners. *Id.* For a general discussion on the change in the American law of servitudes in the nineteenth century that focuses on its conceptual origins in contract law, see Reichman, *supra* note 151, at 1211-30.

<sup>153</sup> Starting in 1986, the American Law Institute began its effort to simplify, clarify, and modernize the law and unify it under the single conceptual rubric of servitudes. Susan French, *Design Proposal for the New Restatement of the Law of Property—Servitudes*, 21 U.C. DAVIS L. REV. 1213, 1213, 1221-26 (1988). Five Tentative Drafts were adopted in 1989, 1991, 1993, in 1994, and 1996. The final version was published in 2000. For an overview of the general approach of this effort, see Susan F. French, *Highlights of the New Restatement (Third) of Property: Servitudes*, 35 REAL PROP. PROB. & TR. J. 225 (2000) [hereinafter *Highlights*].

<sup>154</sup> For a general discussion of history of American law of servitudes and a proposal to clarify and unify the law of servitudes, see Reichman, *supra* note 151, at 1179-82.

<sup>155</sup> French, *supra* note 6, at 1319 (describing the current state of the law as entangled in ancient doctrine and advocating for a modern law of servitudes).

<sup>156</sup> Richard A. Epstein, Symposium Issue: Comment: *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1358 (1982) (contending that freedom of contract should control in the law of servitudes and that the only role for public intervention is that of providing notice).

<sup>157</sup> See Reichman, *supra* note 151, at 1230-40 (providing a functional analysis of the law

did Professor French<sup>158</sup> and Berger.<sup>159</sup> Others have since joined in the debate.<sup>160</sup>

The foremost advocate of a freedom-of-contract approach to the law of servitudes has been Richard Epstein. In contrast to the traditional property approach, the contract approach espoused by Epstein applies the freedom-of-contract principle to resolve the rights and duties of the parties. In particular, this approach encourages courts to look to the bargaining expectations and probable intentions of the parties. After all, says Epstein, a grant is nothing more than a completed contract<sup>161</sup> and “with notice secured by recordation, freedom of contract should control.”<sup>162</sup> In other words, virtually anything goes if an interested party has record notice of the restriction. The Restatement (Third) of Property takes a position largely based on a goal of simplifying and standardizing the law of servitudes. To achieve that goal, the Restatement applies a contract approach to measure the substantive validity of servitudes. Section 3.1 provides that “[a] servitude . . . is valid unless it is illegal or unconstitutional or violates public policy” while comment “a” acknowledges that Section 3 follows the approach taken by the Restatement (Second) of

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of servitudes to illustrate that merging legal concepts will merely achieve what the courts have already put into practice).

<sup>158</sup> See French, *supra* note 6 at 1304-19 (detailing a proposal for a modern law of servitudes).

<sup>159</sup> Curtis Berger, Symposium Issue: Comment: *Some Reflections on a Unified Law of Servitudes*, 55 CAL. L. REV. 1323 (1982).

<sup>160</sup> See Epstein, *supra* note 156, at 1353-54, 1358-60 (arguing that neither liberty nor efficiency can justify any restriction on contractual freedom to create servitudes that bind successors-in-interest); *cf.* Berger, *supra* note 159, at 1337 (1982) (agreeing with Professors French and Reichman that there should be a unified law of servitudes and that the dominant variable in such a unified system should be the parties’ intention rather than extraneous issues like privity and the touch and concern requirement); Steward E. Sterk, *Foresight and the Law of Servitudes*, 73 CORNELL L. REV. 956, 965, 969-70 (1988) (accepting the freedom-of-contract approach to law of servitudes only if private arrangements are subject to limited public intervention). *But cf.* Gregory S. Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883, 883-85 (1988) (examining the debate over touch and concern doctrine and changed conditions doctrine to illustrate that neither a strict freedom of contract ethic, as proposed by Professor Epstein, nor a regulatory ethic, is feasible, and that such radically alternative choices distort social reality and undermine the debate over servitude reform); *see* Stewart E. Sterk, *Freedom From Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615, 616-17 (1985) (contending that freedom-of-contract creates externalities that affect third parties whose interests are not represented in the negotiation process and that landowners have limited foresight about how difficult and expensive the transaction costs can be to remove restrictions that bind multiple parties).

<sup>161</sup> Epstein, *supra* note 156, at 1356.

<sup>162</sup> *Id.* at 1358 (explaining that restrictions suggested by French and Reichman, who propose additional public intervention, should not be implemented if such restrictions impinge on freedom-of-contract).

Contracts.<sup>163</sup> As illustrated below, however, in other respects the drafters seem to have applied an eclectic approach informed primarily by policy considerations.

Commentators disagree over the viability of traditional requirements for enforcing a real covenant. As to the privity requirements, “scholars agree that prior to the nineteenth century the running of both benefits and burdens of covenants as between fee owners was taken for granted,” because the early English law focused primarily on the running of covenants between landlords and tenants.<sup>164</sup> The modern concern with privity is based on the following dictum by Lord Kenyon in *Webb v. Russell*: “It is not sufficient that a covenant is concerning the land, but, in order to make it run with the land, there must be privity of estate between the covenanting parties.”<sup>165</sup> As English feudalism faded, the common law courts began promoting the need for alienability of real property interests as a way to make land use more productive. The connection between alienability and productivity seems even more relevant in modern America, where land uses change constantly as compared to the single-land-use agrarian society that faced the early English common law courts. Because land use restrictions tend to deter alienability, the common law courts historically required that both parties have an interest in the land being restricted to ensure that the burden created by the covenant would be compensated by a corresponding benefit to some contiguous or proximate parcel. This “horizontal privity” prevents covenants that impose affirmative burdens from benefiting or binding successors, except for those covenants contained in leases.<sup>166</sup>

In contrast to the English courts, the American courts have traditionally allowed the running of covenants in the case of conveyances of fee simple title by circumventing the horizontal privity requirement. They accomplished this through the invention of legal fictions such as “instantaneous privity,”<sup>167</sup> application of the Massachusetts exception to find the requisite privity (called “simultaneous privity”) when the land is touched by an easement,<sup>168</sup> or by

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<sup>163</sup> RESTATEMENT (THIRD) OF PROPERTY §3.1 (2000) (by quoting RESTATEMENTS (SECOND) OF CONTRACTS, ch. 8, introductory cmt. (1981)) (“In general, parties may contract as they wish, and courts will enforce their agreements without passing on their substance . . . . The principle of freedom of contract is rooted in the notion that it is in the public interest to recognize that individuals have broad powers to order their own affairs.”).

<sup>164</sup> Olin Browder, *Running Covenants and Public Policy*, 77 MICH. L. REV. 12, 15 (1980) (recalling that pre-nineteenth century English law took for granted the validity of covenants running between landlords and tenants, even if not judicially established).

<sup>165</sup> 100 Eng. Rep.639, 644 (K.B. 1789); see Browder, *supra* note 164, at 15.

<sup>166</sup> French, *supra* note 6, at 1292.

<sup>167</sup> Browder, *supra* note 164, at 21 (recognizing the American development whereby in order “for a covenant to run it must be accompanied by a conveyance of affected land from one of the affected parties to the other”).

<sup>168</sup> *E.g.*, *Morse v. Aldrich*, 36 Mass. 449, 452-54 (1837) (holding that while at common law heirs are not bound by covenants made by their ancestors unless explicitly stated this

simply ignoring the rule.<sup>169</sup> While most American courts will not uphold a real covenant without some form of conveyance of an interest in the servient estate,<sup>170</sup> a few American courts still follow the traditional horizontal privity doctrine.<sup>171</sup>

The vertical privity requirement presents another obstacle to the running of covenants. The nineteenth century English courts generally regarded contract rights and responsibilities as personal undertakings and thus by nature non-assignable to others. The English courts were also concerned that subsequent purchasers might be bound by covenants that were unknown to them. By requiring a relationship between the original covenanting parties and their successors in interest, the vertical privity requirement helped ensure that successors would become aware of the promises made by their predecessors-in-interest. The notice function of the vertical privity requirement has become obsolete, however, as American recording statutes require that subsequent parties receive notice. In addition to providing notice, vertical privity created the concept of benefits and burdens attaching to the land and running to successive owners regardless of whether they had bargained for or had agreed to the promises of the covenanting parties.<sup>172</sup>

As explained above, vertical privity is no longer necessary to make covenants run. Returning to our example, assume that grantee B agrees that his promise not to use the property for nonresidential purposes shall bind his successors and assigns. This language indicates that B intends that the negative promise run with the land and the running of this promise is part of what A had bargained for in his contract with B. This is analogous to the issue of whether a covenant of seisin attached to a warranty deed should run with the land. In both instances, whether there is a negative promise of B to A or an affirmative promise of seisin by A to B, the covenantee bargains for the running of the covenant for the protection of subsequent interest-holders such

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principle does not apply to real covenants running with the land attached to secure the full benefit of the grant); see French, *supra* note 6, at 1293-94.

<sup>169</sup> *E.g.*, *Sea Watch Stores Ltd. v. Council of Unit Owners*, 691 A.2d 750, 761 (Md. Ct. Spec. App. 1997) (discussing the modern view of privity which “abolished the requirements of both horizontal and mutual privity, retaining only the requirement of vertical privity”, to wit when the person bearing the benefit of burden of a covenant is the original successor to the covenantor).

<sup>170</sup> French, *supra* note 6, at 1294. However, this limitation, albeit more tepid than the English rule, prevented useful covenants from being enforced by neighbors, homeowners associations, and conservation organizations.

<sup>171</sup> *E.g.*, *Wayne Harwell Properties v. Pan American Logistics Center, Inc.*, 95 S.W.2d 216, 218 (Tex. Ct. App. 1997) (holding that assignment of interest in the cash flow of land is a personal covenant that does not run with the land).

<sup>172</sup> The legal device of using the privity concept to make benefits and burdens of real covenants run was introduced in the famous *Spencer's Case*, 77 Eng. Rep. 72, 74 (Q.B.1583). For a historical perspective on judicial treatment of covenants and equitable servitudes in England and America, see Browder, *supra* note 164, at 14-31.



as X and C, respectively. Under modern contract principles, rights under a contract are assignable,<sup>173</sup> as are burdens and duties.<sup>174</sup> Moreover, to the extent the common law courts created the horizontal and vertical privity concept to require relationships between the original parties and their successors in interest, these legal relationships already exist by virtue of the privity created by their contracts of sale.<sup>175</sup>

A contract approach also avoids the chief pitfall of a property law based concept of vertical privity by addressing the issue of how to make a servitude binding when the dominant estate is less of an interest than the preceding estate. For example, returning to the hypothetical involving A, B, X and C, suppose C is just a lessee of B rather than the new fee owner of Blackacre. Strict vertical privity does not exist on the burden side between B and C and neither A nor X can sue C for money damages under traditional law. Under a modern contract theory, however, when B transferred the benefit of legal possession to C in return for some consideration, C was assigned, by implication, the concomitant burdens of possession, including the aforementioned negative covenant. The Restatement (Third) of Property does not require strict vertical privity in a suit for damages against a successor possessor of the burdened estate, as C would be, and therefore C would be liable for violating the covenant if C had actual or constructive notice of the covenant when it lease Blackacre from B. Instead of relying on the presence of vertical privity to ascertain which benefits and burdens should run to anyone other than a successor fee owner such as tenants, adverse possessors, and life tenants, the Restatement separately identifies the types of benefits and burdens

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<sup>173</sup> Under the U.C.C. a contract right is ordinarily assignable unless the assignment would materially change the duty of the obligor, increase materially the burden or risk imposed on the obligor, or impair the obligor's chance of obtaining return performance. U.C.C. § 2-210(2) (1995). The Restatement (Second) of Contracts includes the additional limitation that a contract right will not be assignable if it will materially reduce the value of performance to the obligor. RESTATEMENT (SECOND) OF CONTRACTS § 149(2)(a) (1981).

<sup>174</sup> For assignment of a contract, the more modern view is that the probable intention of the parties is to create not only an assignment of rights but also a delegation and assumption of duties. CALAMARI & PERILLO, *supra* note 5, § 18.27 (noting that while some courts have adhered to the rule that the phraseology "I assign" creates only an assignment of rights, the more modern view is that the probable intention is that this phrase should delegate duties as well); *see also* U.L.T.A. § 1-315(c), 13 U.L.A. 579 (1986) (providing that an assignment of rights in a contract for the sale of land, unless the language or circumstances indicate otherwise, is a delegation of performance of the duties of the assignor); U.C.C. § 2-210(5) (stating that the other party may treat such assignment as creating reasonable grounds for insecurity that justify a demand for assurances from the assignee) *But see* Langel v. Betz, 164 N.E. 890, 891 (N.Y. 1928) (arguing that the mere assignment of a contract to purchase realty does not imply a promise by the assignee to perform the duties of the assignor).

<sup>175</sup> CHARLES E. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH THE LAND" 131-37 (2d ed. 1947) (concluding that privity in the sense of succession to the estate of either party to the covenant is the only historically justifiable requirement, but that other privity requirements are unjustifiable and unnecessary)

that run to such interest holders.<sup>176</sup>

At common law a promise or covenant affecting real estate, whether a real covenant or an equitable servitude, will not run with the land and bind successors-in-interest unless the parties intend that the covenant runs with and touches and concerns the land.<sup>177</sup> Traditionally, courts have interpreted the touch and concern doctrine, under the popular two-pronged “Bigelow test,”<sup>178</sup> to mean that a covenant’s benefit touches and concerns when it makes the promisee’s interest in the land more valuable and to mean that the covenant’s burden touches and concerns when it makes the servient estate less valuable as a consequence of performance of the covenant. In applying the test some courts have construed the covenant rigidly to prohibit anti-competition covenants;<sup>179</sup> perhaps they have operated on the dubious assumption that one’s economic or financial interest in land ownership can exist separately from the physical use and enjoyment of the land. Courts have also used the touch and concern requirement to deny enforcement of promises they have not liked under the guise of violating public policy or of unreasonably restricting alienability.<sup>180</sup>

By contrast, Professor Reichman advocated expanding the touch and concern requirement so that it would apply all servitudes and not just to the law of covenants. In his opinion, “the permanent attachment to land of merely personal obligations is likely to frustrate the objectives of a private land holding system” and thus makes such restrictions necessary.<sup>181</sup> Specifically, such personal covenants tend to be highly individualized and a successor in interest who finds them inefficient would find them difficult to terminate because of prohibitive transactional costs. In addition, they represent a kind of private legislation that threatens the individual freedoms of future owners, because if these obligations become obsolete, their enforcement could prevent the best use of the property in the future.<sup>182</sup> But as Professor Epstein pointed

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<sup>176</sup> RESTATEMENT (THIRD) OF PROPERTY §§ 5.3-5.5; *see Highlights, supra* note 153, at 234 (stating that the vertical privity doctrine does not adequately identify the burdens and benefits which run to lessees in modern real estate developments).

<sup>177</sup> *Spencer’s Case*, 77 Eng. Rep. 72, 74 (Q.B. 1583); RESTATEMENT OF PROPERTY § 537 (1944) (promise must affect *physical* use or enjoyment of the real property).

<sup>178</sup> *See generally* Barry Bigelow, *The Content of Covenants in Leases*, 12 MICH. L. REV. 639 (1914) (identifying two categories of covenants, those restricting the real rights of the lessee which run with the leasehold under all circumstances, and those that benefit the lessor with respect to his reversionary estate, which will run both with the leasehold and with the reversion).

<sup>179</sup> *Singer, supra* note 146, at 461 (noting that traditionally courts viewed the “touch and concern” doctrine narrowly and held that anticompetitive covenants “did not relate to the use of the land but represented merely economic benefits,” but today these types of covenants are universally understood to “touch and concern” the land).

<sup>180</sup> *Id.*

<sup>181</sup> *Reichman, supra* note 151, at 1233.

<sup>182</sup> *Id.* (commenting that judicial termination of obsolete covenants helps to achieve

out, there is no collective vision or consensus as to what a land holding system should do, and absent a compelling reason to the contrary, landowners should be free to use their land as they so desire. Indeed, to impinge upon the original parties' freedom-of-contract by subordinating their desires to the interests of future third parties—who have no proprietary claim to the property—misapplies both the concept of freedom and the doctrine against restraints on alienation.<sup>183</sup> In response to this issue, Professor French recommended that the touch and concern requirement be supplanted by a broader version of the change of conditions doctrine that would limit the enforcement of a servitude whenever, in the court's discretion, the restriction is deemed to be unreasonable.<sup>184</sup> As detailed by the commentators, the touch and concern doctrine has operated erratically with ambiguous results. The Restatement (Third) of Property abolishes this doctrine and addresses the issue directly by applying a contract approach to deem all covenants valid as long as they do not constitute direct restraints on alienation, irrational servitudes, or unreasonable restraints on trade, nor offend the doctrine of unconscionability.<sup>185</sup>

Another well-established tradition in the law of servitudes is the doctrine of changed conditions. Under this doctrine, neither a covenant or nor an equitable servitude will be enforced if there has been such a radical change in neighborhood (and proximate but outside-the-neighborhood) demographics or other circumstances that would preclude the owner of the dominant estate from enjoying a substantial benefit from the covenant restriction and/or destroy the value of the covenant restriction for the purpose for which it had been created.<sup>186</sup> Covenants and equitable servitudes are rarely stricken under this doctrine, however, and the remedy for violation of these promises is practically always injunctive relief. A party who petitions for injunctive relief does not have to show that damages are an inadequate remedy; nor is the petitioner

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efficiency).

<sup>183</sup> Epstein, *supra* note 156, at 1359-60 (arguing that limiting the private quasi-legislative powers of servitudes to the objective purpose of land planning eliminates the possibility of creating modern variations of feudal serfdom).

<sup>184</sup> French, *supra* note 6 at 1300 (opining that the “changed conditions doctrine provides courts with a mechanism for refusing to enforce servitudes that have become obsolete or unreasonably burdensome”).

<sup>185</sup> RESTATEMENT (THIRD) OF PROPERTY §§ 3.2-3.7 (2000).

<sup>186</sup> RESTATEMENT OF PROPERTY § 564 (1944). Compare *Gey v. Beck*, 568 A.2d 672, 680 (Pa. Super.Ct. 1990) (awarding injunctive relief against violation of covenant granted where property owners wanted to prevent developer from tearing down neighborhood cul-de-sac to build a new road ) with *Owens v. Camfield*, 614 S.W.2d 698, 700 (Ark. Ct. App. 1981) (refusing to enforce covenant where neighborhood was rezoned from residential to business use and the subject property was surrounded on three sides by commercial activities); see generally Mark S. Dennison, Annotation, *Change in Character of Neighborhood as Affecting Validity or Enforceability of Restrictive Covenant*, 76 A.L.R. 5th 337, § 14(d) (2001) ) (reviewing cases where changes in the character of a neighborhood were insufficient to render covenants unenforceable).

required to meet a test that purports to balance the equities as between the parties. Instead, the critical question asks whether enforcement of the restriction would continue to benefit the dominant estate. Absent circumstances of extreme hardship, the courts do not consider the possible detriment to the servient estate caused by perpetuating the use restriction or cost of compliance.<sup>187</sup>

Regarding the changed conditions doctrine, both professors Reichman<sup>188</sup> and French agree<sup>189</sup> that a servitude should not be enforceable when changed conditions make the purpose of the restriction obsolete and/or its impact unreasonable to the current user. Other commentators have severely criticized this position on the grounds that it unjustifiably interferes with property rights,<sup>190</sup> freedom of contract rights,<sup>191</sup> or with the rights of holdouts who do not have a claim against outside changes.<sup>192</sup> Contract advocates would argue that an obsolete promise or completed promise (grant) relating to land should not be treated any differently under the changed conditions doctrine than a promise that is unrelated to land is treated under standard contract and equitable principles. In fact, the very doctrine itself appears closely related to the frustration of purpose and impossibility doctrines of contract law as well as to the equity-based relative hardship doctrine.<sup>193</sup>

Accordingly, why should freedom of contract be impinged upon, and bargaining expectations defeated, when there are protections on the remedial side for interest holders who claim that a land use restriction unnecessarily hampers land use because the rationale for the restriction no longer applies?

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<sup>187</sup> See Timothy C. Shephard, Comment, *Termination of Servitudes: Expanding the Remedies for "Changed Conditions,"* 31 UCLA L. REV. 226, 239 (1983) (commenting that the narrow focus of the "changed condition" doctrine means that conditions are determined without taking into account all the parcels affected by the circumstances in question).

<sup>188</sup> Reichman, *supra* note 151, at 1233 (arguing that "the permanent attachment to land of merely personal obligations is likely to frustrate the objectives of a private land holding system"); see also Carol M. Rose, *Servitudes, Security, and Assent: Some Comments on Professors French and Reichman,* 55 S. CAL. L. REV. 1403, 1404 (1982).

<sup>189</sup> French, *supra* note 6, at 1299 (suggesting that the changed conditions doctrine provides a way to avoid enforcing servitudes that have become obsolete or reasonably burdensome).

<sup>190</sup> See Robert Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Control,* 40 U. CHI. L. REV. 681, 716-17 (1973) (arguing that the invocation of judicial doctrines to terminate covenants often ignores the intent of the parties).

<sup>191</sup> Epstein, *supra* note 156, at 1367 n.29 (suggesting condemnation as an alternative if public use intended).

<sup>192</sup> See Rose, *supra* note 188, at 1414 (arguing that holdout problems could be substantially diminished by limiting servitudes to a fixed duration and periodically renegotiating them).

<sup>193</sup> French, *supra* note 6, at 1280 (noting that courts using the "changed conditions" doctrine have ignored the standard showing of inadequacy of the remedy at law as a prerequisite to equitable relief, as is required by the relative hardships doctrine).

Returning to the example above, if A seeks enforcement of the servitude when the neighborhood has shifted from a residential to a commercial use, A's damages would be nominal, and a court sitting at equity may refuse to enforce the restriction based on equitable considerations that exist separate and apart from the doctrine of changed conditions. A court sitting at equity could prevent enforcement of a covenant or equitable servitude if the harm done to the owner of the servient estate, or to the public, far exceeds any benefit done to the dominant estate.<sup>194</sup> The same result could be had by statute in some jurisdictions.<sup>195</sup> Obsolete restrictions could be terminated under existing contract doctrines such as the doctrines of impossibility of performance, commercial frustration, unconscionability, or they could be terminated based on the conduct of the parties under the doctrines of abandonment, merger, release, or estoppel.

Another weakness of the changed conditions doctrine is that it produces an all or nothing result. Either the covenant is terminated or it is not, and there is no room for modification.<sup>196</sup> By contrast, a combined contract and equitable approach would be more flexible. The use of contract principles would make termination and modification available based on a set of rules that are more uniform and less ambiguous thereby reducing transaction costs. Furthermore, the creation and interpretation of servitudes would be easier, and the flexibility and adaptability of the contract approach would make litigation between the parties less likely. A contract approach would also allow a court to tailor the remedies granted to the parties to the specific facts of the case. For example, in the event the facts are evenly balanced, the court could award some damages to the dominant estate even though a covenant has lost some of its purpose. By protecting the dominant estate with a damages remedy the court could also obviate a decision in favor of specific performance that might cause an inefficient allocation of land resources. Finally, if there is a damages "price" on the value of breaching the covenant, the owner of the servient estate might decide to go ahead with a more productive land use or the parties might be encouraged to reach a monetary compromise to resolve the conflict.<sup>197</sup> Courts

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<sup>194</sup> *E.g.*, *Lange v. Scofield*, 567 So. 2d 1299, 1302 (Ala. 1990) (using the relative hardships test and refusing to enforce a covenant that would harm one landowner without substantially benefiting another).

<sup>195</sup> For example, in New York, if any restriction created by covenant, promise, or negative easement, or by means of a fee simple determinable or fee simple on condition created after September 1, 1958, is of no actual or substantial benefit to the party seeking enforcement, it will not be enforced. N.Y. REAL PROP. ACTS LAW § 1951 (McKinney 2001).

<sup>196</sup> The position of the RESTATEMENT (THIRD) OF PROPERTY is to allow modification where the servitude would still benefit the dominant estate but where the servient estate is no longer suited for the uses permitted by the servitude. RESTATEMENT (THIRD) OF PROPERTY § 7.10(2) (2000).

<sup>197</sup> See Timothy C. Shepard, *Termination of Servitudes: Expanding the Remedies for "Changed Conditions"*, 31 UCLA L REV. 226, 251 (1983).

[C]ourts should allow the breach of restrictions if the breaching party pays damages to

being asked to grant equitable relief such as specific performance and injunctive relief have discretionary authority and can take into account variables and rules such as laches, the doctrine of unclean hands, and public policy.<sup>198</sup>

F. *Implied Warranty of Habitability in Contract to Sell Residential Realty*

In promulgating Uniform Commercial Code Sections 2-314 and 2-315, the drafters of the Code rejected the doctrine of caveat emptor and imposed implied warranties of merchantability and fitness for use with respect to the purchase of personal property. Common law courts frequently apply U.C.C. principles by analogy to contracts that are not covered by the U.C.C.,<sup>199</sup> such as contracts for the sale of residential real property. The first case to hold that a builder must warrant that the construction of a house will be done in a workmanlike manner is believed to have been the 1957 case of *Vanderschrier v. Aaron*, which involved construction of a house that was never finished.<sup>200</sup> The second landmark case occurred in 1964 when the Colorado Supreme Court held in *Carpentre v. Donohoe* that the warranty of habitability applied to a house with crumbling walls that had already been completed, albeit in violation of local building codes.<sup>201</sup> It is no coincidence that *Vanderschrier* and *Carpentre* were decided about the same time that *Pines v. Perssion* came onto the scene and made its mark in landlord-tenant law.<sup>202</sup>

Underlying the doctrine of caveat emptor are two assumptions: first, that the purchaser is capable of protecting himself by making a diligent beforehand inspection, and second, that the purchaser has adequate bargaining power to demand that the seller cure any significant defects, and if he does not, to go elsewhere.<sup>203</sup> Social action in the late 1950s and early 1960s prompted courts

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the dominant lots. The lot affected by the change in circumstances would gain from becoming unrestricted and would apply part of the gains toward mitigating the losses incurred by the dominant lots.

*Id.*

<sup>198</sup> CALAMARI & PERILLO, *supra* note 5, §16.7 (stating that modern courts have discretion to make equitable decisions based on precedent, principles and doctrines that have to a large extent hardened over the last two centuries).

<sup>199</sup> *Id.* § 1.7 (noting that the code may be persuasive even in situations outside its purview because it represents the foremost legal thought concerning commercial transactions).

<sup>200</sup> 140 N.E.2d 819 (Ohio Ct. App. 1957); see Caryn Chittenden, Note, *From Caveat Emptor to Consumer Equity—The Implied Warranty of Quality under the Uniform Common Interest Ownership Act*, 27 WAKE FOREST L. REV. 571, 579 (1992).

<sup>201</sup> 388 P.2d 399, 402 (1964); Chittenden, *supra* note 200, at 579-80.

<sup>202</sup> See discussion *supra* Part I (historical rationale for caveat emptor)

<sup>203</sup> Alan N. Weinberger, *Let the Buyer Be Well Informed—Doubting the Demise of Caveat Emptor*, 55 MD. L. REV. 387, 391 (1996). Some historians have traced the doctrine back to Roman law and even to earlier Jewish law, where, according to one commentator, “[t]he scholars called land something that is always worth the money paid for it.” *Id.* at n.28.

to question whether caveat emptor was compatible with the need and social desirability for adequate housing. Courts remarked that prospective purchasers did not have an ability, means, and opportunity to inspect the property in a manner available to the seller<sup>204</sup> and reasoned that the ordinary purchaser simply did not have the expertise and skill needed to inspect competently every nook and cranny of a house; nor did he or she have the means to hire experts to do so.<sup>205</sup> Moreover, if vendors of consumer goods like vacuum cleaners are charged with protecting buyers, then a fortiori purchasers of living space, which more vitally affects the health and well being of the consumer, should also receive protection. The simultaneous existence of two sets of transactional rules, one for personalty and the other for realty, has been soundly criticized.<sup>206</sup> Why should a second body of law exist to operate under the ancient principle of caveat emptor?

Policy alone, however, can not reverse doctrines like caveat emptor that have been part of the common law century after century without offending stare decisis. Consequently, when the issue arose in landlord-tenant law as to whether the landlord should become responsible for commencement defects,<sup>207</sup> notwithstanding caveat emptor, the District of Columbia Circuit Court of Appeals in *Brown v. Southall Realty Co.*<sup>208</sup> used a creative contract approach to strike down caveat emptor. The *Brown* Court reasoned that because numerous building code violations existed at the commencement of the lease term it could refuse to aid in the eviction of tenants for nonpayment of rent

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<sup>204</sup> See *Humber v. Morton*, 426 S.W.2d 554, 561 (Tex. 1968) (deciding that to apply the doctrine of caveat emptor to an inexperienced buyer, in favor of a professional builder, is a denial of justice).

<sup>205</sup> See, e.g., *Barnes v. MacBrown & Co.*, 342 N.E.2d 619 (Ind. 1976) (applying the rules of personal property warranties to real property transactions; see Joseph Brown, Note, *The Implied Warranty of Habitability Doctrine in Residential Property Conveyances: Policy-Backed Change Proposals*, 62 WASH. L. REV. 743, 745-48 (1987) (noting that applying the warranty of habitability doctrine to real property transactions will have the additional public policy benefit of encouraging better construction quality).

<sup>206</sup> See Samuel Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 576-77 (1950) (commenting on the proposed commercial code and lamenting that

it is unfortunate that there should be a different rule for contracts for the sale of goods from that governing sales of shares of stock or of land . . . . It would be better to enact a general statute on the subject than to make this special rule for the sale of goods.

*Id.* But see Arthur L. Corbin, *The Uniform Commercial Code—Sales; Should It Be Enacted?* 59 YALE L.J. 821, 836 (1950) (arguing for adoption of the Uniform Commercial Code but cautioning that unforeseen situations may call for more flexibility in the law than the code allows).

<sup>207</sup> Caveat emptor becomes irrelevant with respect to post-commencement defects because even the tenant who meets his caveat emptor burden by making a diligent beforehand inspection cannot look for defects that do not arise until the lease term begins. See *supra* Part I.

<sup>208</sup> 237 A.2d 834 (1968). See discussion *supra* at Part I.

because to do so would be tantamount to enforcing an illegal contract for the benefit of the wrongdoing landlord.<sup>209</sup> Indeed, in the famous *Javins* decision, the same court cited a case involving construction defects in a home<sup>210</sup> to make the implied contract argument that the court used to strike down the no repair rule with respect to post-commencement defects. By way of analogy to *Javins*, if local law standards can be implied into a residential lease contract to override the no repair rule, one does not have to leap far to argue that these same implied standards should trump caveat emptor.<sup>211</sup> And with caveat emptor swept aside, it follows that when a buyer agrees to purchase a home, she relies on the expertise of the builder or vendor, and her normal bargaining expectation is that the building will be constructed in a safe and in habitable condition.

Presently, the vast majority of states recognizes an implied warranty of habitability between the buyer and seller in the sale of completed new homes, especially when the seller is a developer or builder.<sup>212</sup> Commentators have urged courts to extend warranty protection to subsequent purchasers and liability to prior vendors,<sup>213</sup> while the Uniform Land Transaction Act of 1975

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<sup>209</sup> *Southall*, 237 A.2d at 836-37.

<sup>210</sup> *Javins v. First Nat'l Realty Corp.*, 428 F. 2d 1071, 1076 n.23 (citing *Schiro v. W. E. Gould & Co.*, 165 N.E.2d 286 (Ill. 1960)) (stating that implied warranties previously inhibited by the rigidity of real property law had recently been extended to making builders of new homes liable for failing to comply with local building codes).

<sup>211</sup> See discussion of *Javins supra* at Part I.

<sup>212</sup> E.g., *Carpenter v. Donohoe*, 388 P.2d 399, 402 (Colo. 1964) (extending the implied warranty doctrine to "include agreements between builder-vendors and purchasers for the sale of newly constructed buildings, completed at the time of contracting"); *Bethlahmy v. Bechtel*, 415 P.2d 698, 710 (Idaho 1966) ) (extending the implied warranty doctrine to include "agreements between builder-vendors and purchasers for the sale of newly constructed buildings"; *Loraso v. Custom Built Homes, Inc.*, 144 So. 2d 459, 461 (La. Ct. App. 1962) ("[I]t is too fundamental for citation of authority for the proposition that there was an implied warranty on the part of the [builder] that the sewer facilities constructed would be reasonably fit and functional for the purposes intended."); *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314, 327 (N.J. 1965) (finding an "implied warranty that builder-vendors have complied with the building code of the area in which the structure is located"); *Waggoner v. Midwestern Dev., Inc.*, 154 N.W.2d 803, 809 (S.D. 1967) (holding that a vendor who sold a completed home could be held liable to purchasers for a breach of the implied warranties of workmanship and habitability).

<sup>213</sup> See generally Linda Libertucci, Comment, *Builder's Liability to New and Subsequent Purchasers*, 20 Sw. U. L. REV. 219 (1991) (examining builder-vendor liability for the implied warranty of quality and arguing for an extension of the doctrine to new as well as subsequent purchasers of homes); see also Leo Bearman, Jr., *Caveat Emptor in Sales of Real Property—Recent Assaults Upon the Rule*, 14 Vand. L. Rev. 541, 543 (1961) (arguing for the replacement of the doctrine of caveat emptor with doctrines such as implied warranty); Paul G. Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633, 648 (1965) (proposing the extension of the protection given to purchasers of chattel, by the implied warranty of merchantable quality, to purchasers of real



imposes an implied warranty of quality to the sales of real estate.<sup>214</sup> In the past, courts used doctrines as merger,<sup>215</sup> privity,<sup>216</sup> waiver, and economic loss theory<sup>217</sup> to deny warranty protection to subsequent purchasers; the modern trend, however, has been to extend such protection.<sup>218</sup> One example is the 1979 case of *Moxley v. Laramie Builders*<sup>219</sup> in which the Wyoming Supreme Court stated the following rules:

A home builder's implied warranty of fitness for habitation extends to subsequent purchasers for a *Reasonable* [sic] length of time and is limited to latent defects which become manifest after the purchase. A builder of a home is also liable for damages which are foreseeable and which are caused by his negligence, to subsequent purchasers of such a home with whom he has no contractual relation even though his work is accepted by

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property); Jane P. Mallor, *Extension of Implied Warranty of Habitability to Purchasers of Used Homes*, 20 AM. BUS. L.J. 361, 363 (1982) (exploring the rationale underlying the implied warranty of habitability and finding that rationale compelling with respect to used homes).

<sup>214</sup> U.L.T.A. § 2-309, 13 U.L.A. 609-12 (1986).

<sup>215</sup> See discussion of merger *supra* at Part II.A. (explaining that the merger doctrine may cause a buyer to lose the power to enforce rights under a contract because the contract merges into the deed on the closing date, thus destroying the contractual rights of the buyer).

<sup>216</sup> The argument is that a suit cannot be brought by a remote purchaser who is not in privity of contract with the builder or vendor-defendant. However, this privity requirement between plaintiff and defendant was abolished years ago for tort plaintiffs in the benchmark case of *Clyne v. Helms* based on the common sense rationale that when a landlord is negligent it should be reasonably foreseeable that someone besides the signatory on the lease might be injured. *Brown v. Fowler*, 279 N.W.2d 907, 910 (S.D. 1979) (holding that a housing speculator had a duty to the general public to construct a residence properly, and thus had a duty also to purchasers subsequent to the original buyer). The same holds true in the case of a homebuilder who fails to comply with local building codes.

<sup>217</sup> The argument is that while personal injury is compensable, the economic loss sustained by the buyer who discovers that the property is less valuable than was anticipated is not. See, e.g., *Coburn v. Lenox Homes, Inc.*, 378 A.2d 599, 602 (Conn. 1977) (refusing to extend the implied warranty, as against builder-vendors, to protect subsequent purchasers who suffer only economic loss).

<sup>218</sup> Libertucci, *supra* note 213, at 229; e.g., *Terlinde v. Neely*, 271 S.E.2d 768, 770 (S.C. 1980) (explaining that in making the decision to allow a remedy for subsequent purchasers, based on the contractual obligations imposed on the builder by implied warranties the determining analysis is based on foreseeability and not privity).

<sup>219</sup> 600 P.2d 733 (Wyo. 1979). The defendant in that case constructed a home in which the electrical wiring had been negligently installed by unlicensed electricians who worked for the defendant. The plaintiffs, who purchased the house from the original owners two years after construction, learned that the wiring was defective and dangerous. After state inspectors inspected the house and found numerous violations of the National Electric Code, the plaintiffs rewired the house at a substantial cost. *Id.* at 734-35. The Wyoming Supreme Court reversed the trial court's dismissal of the complaint. *Id.* at 736.

the first owner before the damage became manifest.<sup>220</sup>

### III. IMPLEMENTING REFORM

Part II made the case for reforming the law of real estate contracts and conveyancing based on a contract approach. This Part explores the types of vehicles that are available to accomplish such reform. Reform of contract and conveyancing law could happen either by means of a uniform statute or by means of a case law approach recommended by the drafters of the Restatement of Property. Drafters of the Uniform Land Transactions Act ("U.L.T.A.")<sup>221</sup> and the Uniform Simplification of Land Transfers Act ("U.S.L.T.A.")<sup>222</sup> have made broad reform efforts, but the Restatement (Third) of Property,<sup>223</sup> most of which is dedicated to servitude reform, represents the most prominent current attempt at judicial reform of servitude law.

The U.L.T.A. was modeled after the U.C.C.<sup>224</sup> and had as one of its basic principles the idea that freedom-of-contract should prevail and be limited only by protection of consumers against harmful provisions that they may not be aware of or may not have the bargaining power to avoid.<sup>225</sup> The drafters of Article 2 of the U.C.C. took the same approach in opting for flexibility and freedom of contract as opposed to a rigid body of technical rules as the way to solve problems.<sup>226</sup> For example, the official commentary regarding Passing of

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<sup>220</sup> *Id.* at 735-36 (emphasis added).

<sup>221</sup> U.L.T.A. §§ 1-101 to 4-104, 13 U.L.A. 480-624 (1986) (providing comprehensive provisions as to the relationship between parties in transfers of land).

<sup>222</sup> U.S.L.T.A. §§ 1-101 to 7-103, 14 U.L.A. 256-374 (1990) (providing comprehensive provisions designed to unify and modernize the law of conveyancing, recording, priorities, limitations, liens and public land records).

<sup>223</sup> 2 RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES (2000) (presenting a comprehensive attempt to simplify and clarify the archaic law of servitudes).

<sup>224</sup> The Commissioner's Prefatory Note to the U.L.T.A. (1986) states that "[t]he structure of [Articles 1, 2, and 9] follows that of the Uniform Commercial Code in Articles 1, 2, and 9." U.L.T.A., prefatory note 13 U.L.A. 470 (1986). It further states that "one of the purposes of this Act is to assimilate the law of real estate to that of personal property where there is no reason for a difference." *Id.* The comment to U.L.T.A. § 1-102 (1986) states that the purpose of the Act is "to simplify, clarify [and] modernize . . . the law relating to land transactions . . ." *Id.* § 1-102, 13 U.L.A. 481 (1986). This is achieved

not only by abandoning old rules such as the doctrine of merger of the contract into the deed . . . but also by making the law relating to the sale of real estate identical to that applying to the sale of goods except insofar as intrinsic differences between goods and land call for different results.

*Id.*

<sup>225</sup> U.L.T.A. § 1-103, 13 U.L.A. 482-83 (1986) (stating that freedom of contract is a principle of the Act, but does not extend so far as to permit parties to disclaim the good faith duty and the other obligations imposed by the Act).

<sup>226</sup> See Karl N. Llewellyn, *Why We Need the Uniform Commercial Code*, 10 U. FLA. L. REV. 367, 378 (1957). The flexibility and freedom of contract in sales was necessary to deal

Title under Article 2 explains that “the issues between seller and buyer [are dealt with] in terms of step by step performance or non-performance under the contract for sale and not in terms of whether or not ‘title’ to the goods has passed.”<sup>227</sup> Llewellyn had developed this theory clearly in earlier writings where he explained that in modern complex transactions, title did not exist in one lump, transferred as a whole from one party to another. As he wrote in 1938, title

should be made to serve merely as the general residuary clause . . . as a better-than-nothing, when inquiry has failed to reveal any other . . . solution. . . . Title works out . . . either to obfuscate statement of the results of reasonable decisions, or to misguide decisions. . . . The cut of its many facets is an old-fashioned one which fits few of the modern situations for which it is called upon as a touchstone.<sup>228</sup>

Also, the Restatement (Third) of Property advocates a contract approach with respect to evaluating the validity of servitudes.<sup>229</sup>

The purpose of the U.L.T.A. was fourfold: (1) to clarify property law for economy and efficiency; (2) to create uniformity to facilitate the development of a secondary mortgage market; (3) to modernize property law by exorcizing outdated doctrines such as caveat emptor and merger; and (4) to simplify property transaction through uniformity and statutory implementation.<sup>230</sup> The Act proposed some relatively radical changes to property law including the creation of an implied warranty of quality by sellers of real estate.<sup>231</sup> The

with “the problems faced by law under the peculiar U.S. regime: galloping economic development together with a multiple jurisdictional scheme.” *Id.* Karl N. Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725, 727 (1939) [hereinafter Llewellyn, *Across Sales*].

<sup>227</sup> U.C.C. § 2-401, cmt.1 (1989). *See also id.* § 2-101 cmt.

The purpose [of following a contract approach instead of trying to determine when title has passed under property law theory] is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.

*Id.*

<sup>228</sup> Llewellyn, *Through Title to Contract I*, *supra* note 11, at 170 (arguing that while the concept of title should not be dropped, it should not “give forth the norm for decision in each case when no cogent reason is shown to the contrary”).

<sup>229</sup> RESTATEMENT (THIRD) OF PROPERTY § 3.1 cmt. a (2000).

This section applies the modern principle of freedom of contract to creation of servitudes . . . . The principle of freedom of contract is rooted in the notion that it is in the public interest to recognize that individuals have broad powers to order their own affairs. The effect of the rule is to shift to the party claiming invalidity of a servitude the burden to establish that it is illegal or unconstitutional, or violates public policy.

*Id.* (internal quotation marks and citation omitted).

<sup>230</sup> U.L.T.A. § 1-102, 13 U.L.A. 481 (1986) (setting out the underlying purposes of the Uniform Land Transactions Act).

<sup>231</sup> *Id.* § 2-309, 13 U.L.A. 533 (proposing the imposition of an implied warranty of

remedies offered by the U.L.T.A. mirrored the U.C.C. remedies with the exception of a broader buyer's right to specific performance. In addition, some commentators have suggested that U.C.C. standards regarding anticipatory breach<sup>232</sup> and other situations<sup>233</sup> should be applied to non-U.C.C. transactions.

While U.L.T.A.-based efforts to reform conveyancing law have been somewhat disappointing as no state has adopted the statute *in totum*,<sup>234</sup> it has left a mark as a reforming force. The U.L.T.A. has spurred debate and reevaluation of the existing system among professionals while influencing the judges and scholars.<sup>235</sup> Despite the strong argument for the need for uniformity, commentators have suggested that certain hurdles stand in the way

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quality on sellers of real estate); see discussion *supra* at Part II.F. (exploring the development of the doctrine of implied warranty in real property law).

<sup>232</sup> See 2401 Pa. Ave. Corp. v. Fed'n of Jewish Agencies of Greater Philadelphia, 489 A. 2d 733, 738-41 (Pa. 1985) (Larsen, J., dissenting) (arguing that Pennsylvania should "recognize a consistent rule of anticipatory breach governing all contracts, whether within or without the Uniform Commercial Code").

<sup>233</sup> See Daniel E. Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 FORDHAM L. REV. 447 (1971) (discussing the spread of U.C.C. concepts into areas other than the sale of goods).

<sup>234</sup> In fact, the U.L.T.A. was withdrawn by the Commission in 1990. Ronald Benton Brown, *Whatever Happened to the Uniform Land Transactions Act?*, 20 NOVA L. REV. 1017, 1018 (1996). Portions of the model statute have, however, been adopted in many states. Although the Act itself has never been fully adopted, select portions have been reintroduced in a series of eight separate uniform acts that focus on specific areas of property law. One example is the Uniform Condominium Act ("U.C.A."), which has been adopted in twelve different states. See Michael L. Utz, *Common Interest Ownership in Pennsylvania: An Examination of Statutory Reform and Implications for Practitioners*, 37 DUQ. L. REV. 465, 467 (1999) (noting that, although almost all fifty states have some type of condominium statute, "second-generation" statutes based on the U.C.A. are greater in breadth and detail and usually adopt the U.C.A. with little or no modification.). Also, the Uniform Land Security Interest Act ("U.L.S.I.A.") was promulgated soon after it was endorsed by the ABA Section of Real Property, Probate and Trust Law in 1985. See Norman Geis, *States to Consider Reform Act Conveying Secured Transactions*, NAT'L L. J., March 17, 1986, at 28. It has not been adopted in any state. See Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 167 (1999) (noting that the U.L.S.I.A. has generated a great deal of scholarly interest and debate despite difficulties in legislative enactment).

<sup>235</sup> See Jon Bruce, *The Role Uniform Real Property Acts Have Played in the Development of American Land Law: Some General Observations*, 27 WAKE FOREST L. REV. 331, 336-38 (1992); Gerald Korngold, *Seller's Influence From A Defaulting Buyer of Realty: The Influence of the Uniform Land Transactions Act on Courts*, 20 NOVA L. REV. 1069, 1070 (demonstrating that the U.L.T.A. nonetheless has been an influential instrument of reform). But see Richard B. Amandes, *The Uniform Land Transactions Act and The Uniform Simplification of Land Transfers Act Twenty Years Later: Why Have There Been No Adoptions?*, 20 NOVA L. REV. 1033, 1035 (1996) (discussing the lack of student support for reform as part of the reason why the U.L.T.A. failed.).

of any national and uniform approach to the law of real property.<sup>236</sup> For one thing, land transactions many not require a uniform approach because land, unlike personal property such as goods, does not move from state to state. The need for legal simplicity and uniformity increases, however, as people become more mobile and buy homes in different states. Further, as the American economy is becoming more homogeneous and larger, multi-state commercial real estate transactions are becoming the norm.<sup>237</sup> The global economy seems to be experiencing a similar trend.<sup>238</sup> Securitization has also revolutionized the way in which real estate is being acquired and financed these days, and the need for uniformity in the secondary mortgage market for residential mortgages is well known.<sup>239</sup> On the debt side of income-producing real estate, the use of commercial mortgage-backed securities (“CMBSs”) along with standardized mortgage and conveyancing documents to finance the acquisition and development of real estate has grown so quickly that the total volume of private securitized debt amounted to \$247.8 billion (or 14.8% of total real estate debt) as of September 15, 2001.<sup>240</sup> One commentator predicts that “given the vast opportunities in real estate, commercial real estate securities will ‘dwarf[] any other,’ including corporate debt, in terms of potential size.”<sup>241</sup>

Furthermore, the creation and passage of a uniform personal property law might have been a much easier task than a similar effort to reform real property law. At its drafting, the U.C.C. was substantially comprised of previously existing uniform laws, such as the Negotiable Instruments Law, the Bulk Sales Act and the Uniform Warehouse Receipts Act, which had already been enacted

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<sup>236</sup> See generally Amandes, *supra* note 235; Marion W. Benfield, Jr., *Wasted Days and Wasted Nights: Why the Land Acts Failed*, 20 NOVA L. REV. 1037 (1996); Brown, *supra* note 234; Ingrid Michelsen Hillinger, *Article 2 Merchant Rules: Karl Llewellyn’s Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 GEO. L.J. 1141 (1985).

<sup>237</sup> See U.L.T.A. § 1-102 cmt., 13 U.L.A. 481 (1986).

<sup>238</sup> As of September 15, 2001 foreign investors owned 10.5 percent of total U.S. real estate equity, totaling \$39.2 billion. PRICEWATERHOUSECOOPERS, EMERGING TRENDS IN REAL ESTATE 2002, at 25 (2001).

<sup>239</sup> U.L.T.A. § 1-102 cmt., 13 U.L.A. 481 (1986).

The fact that land does not move from state to state is not as important to the question whether uniformity is needed in land transactions as is the fact that individuals and business entities do move from state to state and frequently conduct transactions involving land in many states. This is particularly true as to national lenders and as to lenders in the secondary mortgage market.

*Id.*

<sup>240</sup> MADISON, DWYER & BENDER, *supra* note 55, at xxvi (recognizing the growth of mortgage pools and conduits in originating and refinancing small- to medium-sized multifamily and retail loans, as well as offices and hotels); EMERGING TRENDS, *supra* note 238, at 25.

<sup>241</sup> Thomas Gillis, *Credit Strategy*, STANDARD & POORS, CREDITWEEK, Feb. 24, 1986, at 13 (quoting Merrill Lynch Senior Vice President Ron DiPasquale).

in every state.<sup>242</sup> Because several acts within the U.C.C. had also been enacted in more than thirty states, the commercial and legal communities were already comfortable with the major concepts of the U.C.C.<sup>243</sup> In contrast, the drafters of U.L.T.A. may have ignored existing and developing market-based solutions to legal problems.<sup>244</sup> Interestingly, a similar argument was made by Samuel Williston upon the adoption of Article 2 of the U.C.C., i.e., that a firmly rooted and well-developed body of sales law already existed, and that modifications and amendments to that sales law would have sufficed to solve rising problems.<sup>245</sup>

Perhaps the principal reason for the failure of the uniform land acts was the self-interest and political clout of the local attorneys and their bar associations. For starters, real estate law might just be too local in character for nationwide uniformity.<sup>246</sup> Cultural, historical and geographical diversity have led to the

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<sup>242</sup> Amandes, *supra* note 235, at 1034.

<sup>243</sup> *Id.*

<sup>244</sup> See James Charles Smith, *Markets and Law Reform: The Tension Between Uniformity and Idealism*, 20 NOVA L. REV. 1165, 1167-68 (1996).

<sup>245</sup> Samuel Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 565 (1950) (arguing that "amendments and additions to the existing uniform statute were the proper remedy to correct any defects in it and to provide for omitted situations.").

<sup>246</sup> This was the number one answer given in an informal survey of experts who were asked why ULTA was never successful. The survey was conducted by Professor Ronald Brown, who solicited opinions from everyone listed in the *Uniform Laws Annotated* as having been involved at any stage with the U.L.T.A., or the Uniform Land Security Interest Act (U.L.S.I.A.), which dealt with mortgage and foreclosure reform. He also sent the solicitation letter to Internet discussion groups for law professors and real estate professionals. This reason was confirmed in a letter to Professor Brown from James M. Pedowitz, who had acted as an advisor on U.L.T.A. to the Commissioners of the National Conference on Uniform State Laws on behalf of the American Land Title Association and late the Real Property Probate and Trust Law Section of the American Bar Association. In the letter Mr. Pedowitz states:

In my opinion, both from working with the American Bar Association and the New York State Bar Association, the basic underlying resistance to U.L.T.A. and U.S.L.T.A. was that it made academic and practical sense but it was not conceived by the Bar and other interest groups as being in their economic best interest.

James M. Pedowitz, *Letter to the Editor*, 20 NOVA L. REV. 1029 (1996). The "top ten reasons" were presented at 1996 Symposium entitled *Whatever Happened to the Uniform Land Transaction Act*. The other nine reasons (by category) given for the failure of the ULTA by the respondents to Professor Brown's survey, which provided insights and perhaps comic relief to the Symposium audience, starting with the tenth (least) most frequent answer, were:

10. Almost no one understood it.
9. It *would not do* for real estate what the U.C.C. did for the sale and sales financing of goods.
8. It *would do* for real estate what the U.C.C. did for the sale and sales financing of goods.

creation of local property law practices making property law one of the most diverse bodies of law.<sup>247</sup> Furthermore, states and localities by nature loathe to cede their control once they establish it, and the diversity of local laws created local interest groups that support the status quo.

Perhaps the strongest argument against reform is the notion based on *stare decisis* that parties entering into a land transaction should be able to rely on established rules. Additionally, professionals with knowledge of current local systems do not want change. This inertia is particularly pervasive in real property law because of its ancient and complex roots.<sup>248</sup> As the New York Court of Appeals stated:

In business transactions, particularly, the certainty of settled rules is often more important than whether the established rule is better than another or even whether it is the "correct" rule. This is perhaps true in real property more than any other area of the law, where established precedents are not likely to be set aside.<sup>249</sup>

Karl Llewellyn once observed while advocating for adoption of the U.C.C.:

The question that faces a lawyer first of all, as he thinks about [reform], is: Do I have to learn all over again everything that I have already learned and upon which I have relied now these many years? Is the law which I have practiced to be upset by a new body of material? Must I start afresh?<sup>250</sup>

The fact is *that real estate lawyers do know and practice the law of contracts in virtually every area of business*, so applying a broader contract approach to

7. It was drafted by commercial law people rather than conveyancers

6. No one ever heard of it.

5. It was only a boondoggle by law professors.

4. It was almost totally ignored by law professors.

3. Real property lawyers did not want to learn something new.

2. Real property lawyers were afraid that it might hurt them economically.

Ronald B. Brown, *Whatever Happened to the Uniform Land Transactions Act?*, 20 NOVA L. REV. 1017, 1019 (1996) (emphases added).

<sup>247</sup> For example, the nature of a deed given to the grantee is mostly a function of local custom. So, bargain and sale deeds are commonplace for residential transactions in New York City while general warranty deeds are common in upstate New York and for large commercial transactions throughout the state. Covenants contained in deeds also vary from jurisdiction to jurisdiction. ROBERT G. NATELSON, *MODERN LAW OF DEEDS TO REAL PROPERTY* 313 (1992) ("Local diversity of covenants for title renders national generalizations difficult and potentially misleading.").

<sup>248</sup> Norman Geis, *Preface to Symposium on the Uniform Real Property Acts*, 27 WAKE FOREST L. REV. 325, 328 (1992).

<sup>249</sup> *Holy Props. Ltd. v. Kenneth Cole Prods., Inc.*, 661 N.E.2d 694, 696 (N.Y. 1995) (citations omitted). In dealing with a commercial tenant who had abandoned the lease premises, the court decided not to reform the majority rule at common law that a landlord does not have to mitigate damages when a tenant abandons the leased premises.

<sup>250</sup> Karl N. Llewellyn, *Why a Commercial Code?* 22 TENN. L. REV. 779, 781 (1953).

conveyancing law should not be very jolting. In this respect, the situation would be comparable to what the U.C.C. was like for lawyers engaged in sales transactions prior to the enactment of Article 2 of that Code.

The U.C.C.-U.L.T.A. model did not fail because of the differences between real and personal property. Nor did it fail because of the freedom of contract principles espoused and endorsed by the U.C.C. It failed primarily because conveyancing law reform is not amenable to statutory reform. If reform does come it will have a two-part reformist engine, the first being the contract approach and the second being judicial reform as opposed to statutory reform.

On the surface there is a lot to be said for a statutory approach to property reform. Evidence suggests that uniform act reform can be very successful. The Uniform Commercial Code has been adopted by forty-nine states and the Uniform Residential Landlord Tenant Act ("U.R.L.T.A.") has been adopted in its entirety in fifteen states and with some modification in other states.<sup>251</sup> The arguments for implementing reform by means of a uniform act are persuasive. Judicial acceptance of reform based on a Restatement of Property model may take years and will have to wait for the right cases to raise the relevant issues. Efforts by courts may also be thwarted by stare decisis.<sup>252</sup> Statutes, on the other hand, are designed to express clear and unequivocal rules, and if enacted, have an immediate impact. As one commentator puts it:

Law reform by legislation rather than judicial decision offers certain advantages. Legislatures can engage in fact finding, fully consider an issue, and determine public policy and priorities as well as craft comprehensive solutions. In contrast, courts can only decide issues before them. Moreover principles of separation of powers arguably require that legislatures make policy choices.<sup>253</sup>

Further, a uniform act involves preparation by experts in the field and is evaluated by the National Conference of Commissioners on Uniform State Laws.<sup>254</sup> Additionally, statutory change does not have the drawback of defeating the expectation interests of parties who relied on the old rule in their transaction because the statute could be made to apply only prospectively.<sup>255</sup>

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<sup>251</sup> Table of Jurisdictions Wherein Act Has Been Adopted, U.R.L.T.A., 7B U.L.A. 527-30 (2000).

One commentator has suggested that a uniform land act would be more palatable to a local community if it were to take a narrow-gauged or single-issue approach inasmuch as it would require less political capital and be less daunting to real estate experts than an act with a sweeping scope. Jon W. Bruce, *The Role Uniform Real Property Acts Have Played in the Development of American Land Law: Some General Observations*, 27 WAKE FOREST L. REV. 335, 343 (1992).

<sup>252</sup> CRIBBET & JOHNSON, *supra* note 14, at 395-96.

<sup>253</sup> See Kormgold, *supra* note 7, at 706 (comparing the benefits that legislative reform vis-à-vis judicial reform).

<sup>254</sup> Brown, *supra* note 246, at 1022.

<sup>255</sup> See *Holy Props. Ltd. v. Kenneth Cole Prods., Inc.*, 661 N.E.2d 694, 696 (N.Y. 1995).



Even though there is a strong case for statutory reform, property law is simply not a realm where reform legislation has taken hold. As discussed earlier, neither the Uniform Vendor and Purchaser Risk Act nor the Uniform Residential Landlord Tenant Act has made more than a limited impact.<sup>256</sup> The U.L.T.A. failed to impose an implied warranty of habitability in real estate sales contracts while case law found those warranties to exist in residential leases. In *Javins*, the judicial approach succeeded partly because the theory of implied contract, based on local housing code standards in the case, was and still is flexible enough to take into account the differences in how rigorously different jurisdictions enact and enforce their local health and housing codes.<sup>257</sup> Warranties of habitability are imposed in a majority of jurisdictions and they are considered to be progeny of the benchmark *Javins* decision. It could be argued that what brought about the *Javins* result was the strong public policy in favor of protecting the health and safety of tenants<sup>258</sup> and that similar compelling reasons do not exist for the other reform measures discussed above. Even so, other courts have treated a lease agreement as a contract and overruled obsolete property concepts where there was no compelling public policy reason to do so.<sup>259</sup>

The judicial approach is also less intimidating to local special interests than is the U.C.C. analogy espoused by U.L.T.A. The gradualism of a judicial

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<sup>256</sup> RISK ACT, *supra* note 127 (providing a table of the jurisdictions that have adopted the Risk Act and noting that only three states have enacted the Risk Act since 1963); U.R.L.T.A., *supra* note 80 (providing a table of the jurisdictions that have adopted the URLTA.).

<sup>257</sup> See *supra* text accompanying note 45 (discussing the issue of providing a private remedy above and beyond that decided upon by the legislature).

<sup>258</sup> *But cf.* *Bowles v. Mahoney*, 202 F.2d 320, 328 (D.C. Cir. 1953) (Bazelon, dissenting) (where the dissent argued unsuccessfully that the risk of injury to tenants should be shifted to the landlord due to "social and economic need."); see also *supra* text accompanying notes 37-38 (arguing that the contract approach used in *Javins* managed to succeed where Bazelon failed in *Bowles*).

<sup>259</sup> *E.g.*, *Blackett v. Olanoff*, 358 N.E.2d 817, 819 (Mass. 1977) (focusing on landlords' action as failure of performance under contract law principles in holding that landlords were not entitled to collect rent for nearby apartments that were not reasonably habitable when the landlords had leased property to a nearby cocktail lounge, thereby creating and controlling the conditions which caused plaintiff tenants to vacate their apartments); *Wright v. Baumann*, 398 P.2d 119, 120-22 (Or. 1965) (holding that in the event of an abandonment of premises, trend has been in favor of requiring landlord to mitigate damages by making reasonable efforts to re-let the premises); see also, *O'Brien v. Black*, 648 A.2d 1374, 1374-76 (Vt. 1994) (holding that the "duty to mitigate" principle of contract law also applies in the landlord-tenant context when commercial tenant abandoned premises in shopping mall one year before lease term expired); *Drutman Realty Co. v. Jindo Corp.*, 865 F. Supp. 1093, 1100 (S.D.N.Y. 1994) (recognizing that it is well-established law in New Jersey, in both commercial and residential contexts, that landlords have a duty to mitigate damages in the case of abandonment under modern notions of justice and fairness). See also *supra* notes 70, 72, 74, 76 and accompanying text.

approach to reform should be more tolerable to those with a vested interest in the status quo and, if reform should be urged by the local courts rather than by a state legislature, these special interest groups would not be able to exercise their political clout to delay or prevent reform. This judicial effort at property law reform has also succeeded in the other areas of landlord-tenant law<sup>260</sup> where the courts have downplayed the analogy to the law of goods and instead have focused on the differences between modern contract theory and ancient property law. Those still favoring a statutory approach must remember that sometimes judicial reform sparks and guides statutory change. For example, the warranty of habitability in the Uniform Residential Tenant Act merely followed earlier common law doctrine already established by decisions like *Pines* and *Javins*.<sup>261</sup>

Property law has enjoyed considerable success in judicial reform in some areas such as the warranty of habitability in the landlord-tenant area. Perhaps that explains why the new Restatement (Third) of Property takes a judicial approach to deal with the law of servitudes. At present the Restatement appears to be the best vehicle for property law reform by advocating a contract approach to the law of real estate contracts and conveyancing. The Restatement approach, which hopes to influence courts by setting standards that are on the leading edge of the law, has had a long history of success. This impact has, if anything, intensified; total published citations to Restatements by 1998 were up to 141,087. The effect of the Institute on court decisions, on advocacy, on scholarship, and on continuing legal education has been simply immense. The complaints of 1923 about the scattered nature of the common law are now rarely heard. The visions of the founders have been realized.<sup>262</sup>

The judicial approach is not without difficulties, but the potential hurdles are not insurmountable. Because property law by its nature is locally controlled and interpreted, substantial change may come gradually. After waiting so many decades, this result would be better than no change at all. The more radical the changes and the more surprises included in a new reform approach, the more resistance it is likely to encounter. Those worried about the reliance and surprise factor have little reason to fret. While the rules would change, the parties would be able to rely on the law of contracts, which is largely uniform, universal, and based primarily on the normal bargaining expectations of the

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<sup>260</sup> See *supra* notes 70, 72, 74, 76 and accompanying text.

<sup>261</sup> See U.R.L.T.A. § 2.104; discussion *supra* in Part I (discussing the reasoning and effects of the *Javins* and *Pines* decisions as they relate to the warranty of habitability).

<sup>262</sup> John P. Frank, *The American Law Institute, 1923-1998*, 26 HOFSTRA L. REV. 615, 638-39 (1998) (highlighting the success and importance of the Restatements since their inception.). See also Allan E. Farnsworth, *Ingredients in the Redaction of the Restatement (Second) of Contracts*, 81 COLUM. L. REV. 1 (1981) (noting the accolades that have been given to the Restatement of Contracts since it was first published); Bruce, *supra* note 251, at 339 (observing that Restatements tend to have a much longer life span than uniform acts; as for example, modern courts continue to cite the initial Restatement of Property that was published in five volumes from 1936 to 1944).

parties.

#### IV. HAS THE RECENT TREND TOWARDS CONTRACT PRINCIPLES RENDERED THE REAL PROPERTY DEED OBSOLETE?

Certainly, the reforms proposed in Parts II and III can be achieved without discarding the real property deed as the sole instrument of legal title and recordation. However, as contended below, the substitution of the contract for the deed as the instrument for conveying and recording the title would reinforce the contract approach, and simplify the law of conveyancing.

##### A. *The Historic Rationale for Delivery of Deed Has Become Obsolete*

The oldest records of land transfers, tracing back to Jewish biblical times, evidence a certain formality or symbolism which usually emphasized a public transfer or some other symbolic act combined with a money payment by the transferee. The formalities involved merely emphasized the purchase, and only later did the practice arise of memorializing the transaction by execution and transfer of a deed. Later, the English ceremony of enfeoffment by livery of seisin was used to transfer land.<sup>263</sup> The land-owner was required to symbolically deliver a clod of land or a piece of the house while declaring his intent to transfer interest to the buyer. Further, the physical transfer had to occur at the same time as the symbolic one; the land could not be declared to be feoffed at a later date even if all the other requirements of livery were fulfilled.<sup>264</sup> Livery was similar to the biblical transfers in that it was a public formality, but, unlike before, it emphasized the transfer of land rather than the payment of the purchase price.<sup>265</sup> While the doctrine of livery of seisin made sense in a largely illiterate society and conjures up romantic images of an Englishman of old transferring ownership of his land by handing over a twig to a purchaser, such symbolism no longer serves a useful function today.<sup>266</sup>

Deeds were initially any sealed document effective on delivery and were used to memorialize contracts of different types. Use of deeds for land transfer became more efficient with the enactment of the Statute of Uses in 1535,

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<sup>263</sup> Charles J. Reid, Jr., *The Seventeenth Century Revolution in the English Land Law*, 43 CLEV. ST. L. REV. 221, 281-82 (1995) (discussing the evolution in English land law from the abolition of feudalism to Modern Chancery and mortgage).

<sup>264</sup> *Id.* at 282.

<sup>265</sup> See NATELSON, *supra* note 247, at 3-7 (explaining and giving examples of the way in which biblical transfers of land were public acts that emphasized "the payment of the purchase price by the weighing out and passage of money").

<sup>266</sup> See Roger W. Anderson, *Conveyancing Reform: A Great Place to Start*, 25 REAL PROP. PROB. & TR. J. 333, 334 (Summer 1990). Remnants of these old notions of a physical delivery of symbolic ownership from one individual to another still exist today. For example, some jurisdictions today still do not allow unincorporated associations to own real estate and prohibit a grant from one person to himself and another. *Id.* at 335.

which allowed land to be purchased by deed transfer without livery of seisin.<sup>267</sup> Deeds were further encouraged by the 1677 Statute of Frauds, which required a writing of the deed transfer even when the parties had performed the livery ceremony. Presumably, any instrument could have fulfilled these purposes, but the deed was used because it had existed previously to memorialize the occasion. As one scholar explained:

Deeds were employed widely to effectuate or memorialize important contracts and other transactions . . . . Yet the metaphor of transfer did not die. Delivery of a clod of earth was replaced with delivery of a deed. The instrument [deed] itself, originally *contractual in nature*, became a “conveyance,” somehow distinct from other private law documents.<sup>268</sup>

This history, which ultimately leads to modern property deeds, clearly indicates that traditionally deeds were (and still are) mere formalities without any real function other than to trigger promises about the status of the title and to act as the instrument of transfer and recordation. An interesting footnote to the history of the U.L.T.A. is that its drafters made no attempt to eliminate use of the deed in conveyancing transactions.<sup>269</sup> As contended below, the contract combined with title insurance is a better source of protection for the buyer and; in addition, the contract itself can better serve the parties as the instrument of recordation.

Furthermore, deeds have actually become counter-productive because of obsolete legal appendages, such as the doctrine of merger, that are a function of the deed device. Also, the formalism attached to the law of deeds has posed interpretive problems for the common law courts. Once the deed supplanted the ceremony as the mode of conveyance, rules of construction were created to interpret the written language of the deed. By the seventeenth century, the common law judges themselves conceded that these new rules were being applied in ways that often disregarded the intentions of the parties. The rule that language in the granting clause prevails when it conflicts with other provisions in the deed, and the rule of two “repugnant” clauses in a deed the first of which should prevail,<sup>270</sup> exemplify how arbitrary these rules had become. While these rules for the most part have been abrogated or modified in deference to the contract rule of construction that looks to the probable intentions of the parties, they still sometimes reappear to create problems. One example is the two-grant doctrine in Texas.<sup>271</sup>

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<sup>267</sup> NATELSON, *supra* note 247, at 8-9.

<sup>268</sup> *Id.* (emphasis added).

<sup>269</sup> In fact, U.L.T.A. § 1-201 defines “deed” as well as contract. Comment 6 states that the formal requirements for validity of the deed are not to be governed by the U.L.T.A. but by other laws of the state. U.L.T.A. § 1-201, 13 U.L.A. 486 (Master ed. 1986).

<sup>270</sup> Laura H. Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction*, 34 S. TEX. L. REV. 73, 74-75 (1993).

<sup>271</sup> *Id.* at 75 (noting that the two grant doctrine was returning to Texas law and arguing that its return was “unfortunate”).

An instructive comparison is the pre-U.C.C. title-dominated law of sales of personal property. In those days courts looked to the date on which the goods were transferred by deed, bill of sale, or otherwise, as the modality for issue resolution and problem solving. As a result, the instrument transferring the title and the date of transfer sometimes became more important as a problem-solving tool than the language in the contract between the parties.<sup>272</sup> During the first half of the twentieth century, the traditional concept of title was, according to Professor Llewellyn, a “lump-concept” that theoretically passed according to the intentions of the parties.<sup>273</sup>

For example, title determined who would absorb the risk of loss or damage to the goods, what damages would be available to the aggrieved party in the event of non-performance by the other party, and how bankruptcy would affect a party’s right to the goods.<sup>274</sup> In determining title, however, technical rules arose governing the question of when title should pass, including whether the contract contemplated a present rather than a future sale,<sup>275</sup> and whether the goods were in deliverable condition.<sup>276</sup> Further complicating the use of title as a problem-solver was the fact that payment was not taken directly into account.<sup>277</sup> Soon, title no longer was a lump-concept and instead became a conglomeration of separate property interests that each demanded individual

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<sup>272</sup> Llewellyn wrote, prior to enactment of the Uniform Sales Act, that modern, complex sales transactions had transformed title to chattels into a “mythical” abstraction that the parties could not “objectively and definitely” identify. Llewellyn, *Through Title to Contract I*, *supra* note 11, at 165-67 (discussing the use of the title as the sole means of solving problems.).

<sup>273</sup> Karl N. Llewellyn, *Through Title to Contract and a Bit Beyond*, in 3 *LAW: A CENTURY OF PROGRESS 1835-1935* 80, 100-02 (1937) [hereinafter Llewellyn, *Through Title to Contract II*] (arguing that “while courts were still *talking* ‘meeting of the minds’ [they were] trying to *do* ‘reasonable outcome in the case.’ Thus we still *talk* Title and *talk* Assent to lump-Appropriation.”) (emphasis in original).

<sup>274</sup> *Id.* at 182-83. See, e.g., Note, *The Effect of Prepayment Upon the Buyer’s Right to the Goods*, 37 *COLUM. L. REV.* 630, 632 (1937) (noting that the right to goods and risk of loss was governed by the passage of title under traditional concepts of title, and that in bankruptcy that “[d]espite the seemingly flexible doctrine that title depends upon intent, the presumptions of intent have in many courts, emerged as fixed rules of law” whose rules are based on the title).

<sup>275</sup> ESSEL R. DILLAVOU & CHARLES G. HOWARD, *PRINCIPLES OF BUSINESS LAW* 353-55 (2d ed. 1939).

An unconditional contract to sell specific goods in a deliverable state passes title to the property at the time of the agreement. . . . [Conversely,] [a] contract to sell unascertained or future goods by description or sample causes title to pass only when goods corresponding to the description or sample have been unconditionally appropriated to the contract by one of the parties with the assent of the other.

*Id.* at 353-55.

<sup>276</sup> *The Effect of Prepayment*, *supra* note 274, at 632.

<sup>277</sup> *Id.* at 634.

treatment.<sup>278</sup> The lump-concept was neither broad nor sophisticated enough to govern marketplace transactions.<sup>279</sup> One deficiency of the concept of title was that it was not able to embrace sales concepts such as prepayment of goods, where a buyer makes a full or partial payment before the seller manufactures or obtains the goods.<sup>280</sup> In addition, it could not handle the question of who should have the title when a progress payment is made from the buyer to the seller<sup>281</sup> or when the buyer contracts to purchase the goods and subsequently repudiates the contract.

Like the common law, the Uniform Sales Act (“U.S.A.”) that preceded the U.C.C. was predicated on the notion that, absent a convincing reason to the contrary, the central problem-solver for questions involving risk of loss, action for price, the place and time for measuring damages, the power to replevy goods, and a myriad of other questions was the transfer of title, meaning who took title and when.<sup>282</sup> As discussed elsewhere,<sup>283</sup> the drafters of the U.C.C. rejected this concept in favor of a more flexible contract approach that looks at the performance and intentions of the parties.<sup>284</sup> Consequently, the U.C.C., for

<sup>278</sup> See generally Nathan Isaacs, *The Sale in Legal Theory and in Practice*, 26 VA. L. REV. 651 (1940).

<sup>279</sup> Llewellyn, *Through Title to Contract I*, *supra* note 11, at 105.

<sup>280</sup> *Equitable Liens*, *supra* note 274, at 105.

<sup>281</sup> *U.S. v. Ansonia Brass & Copper Co.*, 218 U.S. 452, 466-67 (1910) (explaining that, while progress payments by themselves cannot transfer the title, a contract that clearly expresses that the intentions of the party are for progress payments to accomplish a transfer is clearly binding and effectual in law.).

<sup>282</sup> See, e.g., U.S.A. § 22 (1906) (noting that the risk of loss generally remains with the seller until title is transferred); U.S.A. § 63 (noting that title must pass under contract of sale before action for price can be brought. See also *The Uniform Commercial Code—The Effect of Its Adoption in Tennessee*, 22 TENN. L. REV. 776, 786 (1952).

<sup>283</sup> See discussion *supra* at Part III.

<sup>284</sup> This contract approach appears in U.C.C. § 2-401, which provides as follows:

Each provision of this Article, with respect to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies *irrespective* of title to the goods except where the provisions refer to such title. . . . (2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods . . . . (3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods, (a) if the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or (b) if . . . no documents are to be delivered, title passes at the time and place of contracting.

U.C.C. § 2-401 (emphasis added). Comment 1 to that section states:

This Article deals with the issues between buyer and seller in terms of step by step performance or non-performance under the contract for sale and not in terms of whether or not “title” to the goods has passed. . . . This section, however, in no way intends to indicate which line of interpretation should be followed in cases where the applicability of “public regulation depends upon a “sale”. . . without further definition.

*Id.* cmt. 1. Another example occurs in comment 1 to U.C.C. § 2-101, which states: “The legal consequences are stated as following directly from the contract and action taken under

the most part, decides legal consequences based on what the parties intended rather than on some arbitrary event such as the formal passage of title. As commerce in goods became more complicated, title as a problem-solving modality became too simplistic.<sup>285</sup>

An oft-cited example of the effectiveness of title as a problem-solving tool is the question of who should bear the risk of loss when goods are lost or damaged while in transit. The answer during the pre-U.C.C. era, like most answers in those days, depended on the date on which the title had passed or was supposed to have passed based on the intentions of the parties.<sup>286</sup> Looking to the intentions of the parties to answer this question was made difficult, however, by the variegated and overlapping rules on the question of intent. Such rules were found in sources such as the common law, language in the contract, trade usage and the Uniform Sales Act. Further complicating the question as to when the parties had intended title to pass was the fact that no real document of title existed at that time even though the bill of lading sometimes functioned as such. The Uniform Sales Act provided little guidance inasmuch as it admonished the parties that its provisions would be applicable "unless a different intention appear[ed]."<sup>287</sup> Moreover, as Professor Llewellyn pointed out, in those days, the location and use of the property could be just as determinative as the transfer-of-title date on the issue of who should bear the risk of loss.<sup>288</sup> For such reasons, the U.C.C. abandoned using passage of title as a problem-solver, and while the concept of title was retained in the Code, title was to be used only as a last resort when the other provisions of the Code failed to settle the question of liability.<sup>289</sup>

Likewise, as contended above in Part II, if conveyancing law for real property could abandon the rigid concept of title (as created by the delivery of a deed) in favor of a broad-based contract approach, then certain nettlesome

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it without resorting to the idea of when property or title passed or was to pass as being the determining factor." U.C.C. § 2-101, cmt. 1 (1989).

<sup>285</sup> See Elvin R. Latty, *Sales and Title and the Proposed Code*, 16 LAW & CONTEMP. PROBS. 3, 3-7 (1951) (arguing that the traditional belief that title would "solve a host of issues in the law of sales" has not been valid since the U.C.C.'s "deliberate belittling of title as a solvent of sales problems"); Llewellyn, *Across Sales*, *supra* note 226 (noting that, while the title is very important in answering sales law questions, it is not always outcome determinative.); *see also* Llewellyn, *Through Title to Contract*, *supra* note 11.

<sup>286</sup> Llewellyn, *Through Title to Contract*, *supra* note 11, at 182-83 (when trying to assign risk of damage or loss the answer is found in the clear intentions of the parties, if they have made such intention clear, or, in all other cases, in the title).

<sup>287</sup> Uniform Sales Act (U.S.A.) § 19 (1906).

<sup>288</sup> See Llewellyn, *Across Sales*, *supra* note 226, at 732-33, 736.

<sup>289</sup> U.C.C. § 2-401 (1962) (explaining the way one should consider title under the U.C.C.); *see also* Official Comment to U.C.C. § 2-401 (1962) ("This Article deals with the issues between seller and buyer . . . under the contract for sale and *not* in terms of whether or not 'title' to the goods has passed.") (emphasis added) (articulating the purposes of U.C.C. § 2-401 and the interaction between the title and the contract under the U.C.C.).

and obsolete rules examined in Part II could be abandoned. One example is the doctrine of equitable conversion, which arbitrarily assigns the risk of loss to the purchaser once the purchaser obtains the so-called equitable title by signing the contract, regardless of who is in control of the property and enjoying the fruits of possession.<sup>290</sup> Other examples discussed in Part II are: (1) the title-dominated rule that if a seller should breach a promise to do something after the closing date, the buyer may be deprived of any redress once the buyer accepts title under the doctrine of merger, and (2) in the event a seller, as grantor under a warranty deed, should breach a covenant of seisin or a covenant of warranty, the purchaser, as grantee, would be barred from recovering damages based on the current market value of the property, if such damages happen to exceed the value of the property, as measured by the purchase price, on the date when the title had been transferred.

### B. *Collapsing Two Transactions Into One*

As observed earlier, case law can be the impetus for statutory reform.<sup>291</sup> Accordingly, if the conflict between property law and contract principles is eventually resolved by the courts in favor of the contract approach, there would be no need to use a real estate deed; nor would it be necessary to have a second formal transaction to transfer a deed and close the title. As discussed in Part V *infra*, if the state legislative authorities can be persuaded to amend the local property and recording statutes, then once the contract of sale is executed and both the seller and purchaser agree that the essential conditions for transferring title have been performed, a shortened version of the contract (memorandum of contract) could be used in lieu of the deed as the sole legal instrument both to transfer the title and to have it simultaneously recorded in the name of the purchaser.

As explained above, the historic and functional rationale for requiring two separate transactions (execution of the contract, and subsequent transfer and recordation of deed on closing date) no longer applies. For that reason, it makes more sense to use the contract of sale, and not the deed, to symbolize the transfer of title and to act as the instrument of recordation. Moreover, since a contract is the most natural way to implement contract principles, a contract of sale certainly is a more fitting companion document in a contract approach than the real estate deed. So why not abandon the deed format if the substance

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<sup>290</sup> Professor Myres S. McDougal leveled sharp criticism at the RESTATEMENT (FIRST) OF PROPERTY for “a too constant fidelity in both purpose and method to tradition. It . . . defines and classifies its problems largely in terms not of facts and social objectives but of legal concepts of high-level abstraction.” See Myres S. McDougal, *Future Interests Restated: Tradition Versus Clarification and Reform*, 55 HARV. L. REV. 1077, 1078 (1942) (outlining and discussing the third volume of the Restatement (First) of Property.).

<sup>291</sup> For example, implied warranty of habitability cases like *Pines* and *Javins* triggered § 2.104 of the U.R.L.T.A. See U.R.L.T.A. § 2.104, comment, 7 U.L.A. 566 (Master ed. 2000); *supra* note 70 and accompanying text.



of the conveyancing transaction is be governed exclusively by contract principles?

If the approach taken by the U.C.C. is followed, the resolution of contract and conveyancing issues of the sort examined in Part II would no longer depend on when title passes. A court that applies the contract approach would instead look at each issue separately and place its emphasis on the intentions and bargaining expectations of the parties as the guiding principle to resolve legal tensions between the seller and the purchaser. To the extent that passage of ownership retains practical importance,<sup>292</sup> remains a last-resort problem-solving modality for the courts, and/or remains necessary in the opinion of public regulators (e.g., local or federal taxing authorities), the contract would replace the deed as the legal evidence of title and the title would pass when the memorandum of contract is recorded after both parties acknowledge on the face of the contract (marked “completed”) that they have performed their respective obligations.<sup>293</sup> This presupposes that the purchaser has paid the balance of the purchase price, that the title search has not revealed any record defect or encumbrance that would significantly reduce the value of the property or restrict its use, and that the other title-transfer conditions laid out in the contract have been met. Courts would continue to use the property law doctrine of *marketable title* to address the difficult questions that arise when the title is not perfect because of a record defect or encumbrance that would prevent a “reasonable” purchaser from accepting the title.<sup>294</sup> Furthermore, promises that contemplate future performance, as for example, a promise by the seller to double the size of a barn within three months, would not interfere with the transfer of title, and if the promise is not met, the aggrieved party could exercise traditional common law contract remedies such as an action for damages. If the seller—without justification—refuses to acknowledge the purchaser’s performance and thereby prevents the recording of the contract, the purchaser could bring an action for specific performance or sue for damages. If one party breaches a promise intended to be performed after ownership is transferred, the aggrieved party could sue for damages or pursue any other legal or equitable remedy allowed under local law.

In addition to being able to provide solutions to the problems outlined above, this one-transaction approach would also simplify land transfers and

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<sup>292</sup> Full fee simple ownership implies a bundle of rights and duties with reference to the land; it includes, for example, the right to exclude others from coming onto the land, the right of possession, and the right to take (or transfer) the products of the soil. As a practical matter one might also need owner status to qualify as a lessor under landlord-tenant law, for example, to bring an action for summary proceedings based on nonpayment of rent.

<sup>293</sup> In contrast to the sale of goods that may have to be delivered physically from seller to purchaser, land is not going anywhere, so the parties do not need the same flexibility to determine when the title passes. This flexibility in the time of title passage is reflected in the language of U.C.C. § 2-401 analyzed *supra* at Part IV.A.

<sup>294</sup> See MADISON, ZINMAN & BENDER, *supra* note 84, at 62-63 (underlying rationale of marketable title).

reduce transactional costs. Modernization and unification, after all, were the twin goals of the Uniform Simplification of Land Transfers Act ("U.S.L.T.A.").<sup>295</sup> To achieve the first goal, the U.S.L.T.A. simplifies the conveyancing rules by eliminating certain formalities such as the witness and acknowledgment requirements as well as some other technical rules. In an era where real estate transactions are handled primarily by lawyers, bankers, and other trained individuals, such formalities are no longer necessary to protect the parties from forgery and misidentification. Regarding the second goal, the drafters of the U.S.L.T.A. described the problem facing them in the following way: "The high cost of real estate transfers has been seen by many analysts in recent years as being a substantial cause of the pricing of housing out of the reach of a large segment of the American public and of discouraging new investment in construction."<sup>296</sup> The uniform statute embodies a number of reforms designed to reduce these costs, such as shortening the required period of title search through the adoption of marketable title acts<sup>297</sup> and reducing the scope of the title search by virtually eliminating interests other than those stated on the official record or those of which a purchaser has actual knowledge.<sup>298</sup> Finally, by replacing the two documents (the contract and deed) with one document (the contract), the one-transaction approach obviates the confusion caused by conflicts in the terms and conditions of the two documents.<sup>299</sup>

### C. *The Proposal*

Drafters of a future Restatement of Property should consider adopting the concept of a broad-reaching contract approach to the law of real estate sales contracts and conveyancing.<sup>300</sup> There is precedent, as this recently was done

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<sup>295</sup> UNIF. SIMPLIFICATION OF LAND TRANSFERS ACT, Pref. Note, 14 U.L.A. 249 (Master ed. 1990); see generally Cori Leonard Ford, *Digest of Selected Articles: Andersen, "Conveyancing Reform: A Great Place To Start," 25 Real Property Prob. & Tr. J. 333 (Summer 1990)*, 20 REAL ESTATE L.J. 205, 205 (1991) (arguing that the U.S.L.T.A. will "accomplish needed reform in the conveyancing doctrine").

<sup>296</sup> U.S.L.T.A., Pref. Note, 14 U.L.A. 249 (Master ed. 1990).

<sup>297</sup> *Id.* at 249-50.

<sup>298</sup> *Id.* at 250.

<sup>299</sup> One example of such confusion in the law of conveyancing is exemplified by the considerable litigation over which promises made by the seller in the real estate contract should survive the closing date under the doctrine of merger. See generally FRIEDMAN, *supra* note 93, § 7-2 at 887-903.

<sup>300</sup> The best prototype for this contract approach is the approach taken by the court in *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970) (implying a warranty of habitability in all lease arrangements and finding that breach of such a warranty gives rise to the usual remedies for breach of contract). In that case, examined *supra* in Part I, the Court observed: "In our judgment the trend toward treating leases as contracts is wise and well considered. Our holding in this case reflects a belief that leases of urban dwelling units should be interpreted and construed like any other contract." *Id.* at 1075. Further,

with respect to the creation and legitimacy of servitudes in Restatement (Third) of Property § 3.1.<sup>301</sup> A prefatory statement or introductory note might provide that: "Contracts for the sale of real property, wherever possible, should be interpreted and construed by courts like any other contract." When the dust settles, judicial views based on a contract approach would ideally become prevalent and uniform throughout the country. As discussed above, the different uniform statutes and Restatements have already espoused some of these views.

Part I of this article explains that the following legal results would flow from a contract approach to landlord-tenant law. Under the *Javins* rationale, housing code standards would be implied into every residential lease contract and would apply to defects that exist both at the beginning and during the landlord-tenant relationship, and the remedy of rent abatement would be available to aggrieved residential tenants. Landlords, as opposed to new tenants, would be responsible for evicting holdover tenants, and in the event of abandonment by a commercial or residential tenant, a landlord would have to re-let the premises to meet the good faith obligation to mitigate. The tenant need not prove that the actions of the landlord were willful to invoke the remedy of constructive eviction. Commercial frustration would be available as a defense to a tenant who wishes to terminate her lease and the *Rule in Dumpor's Case* would be abolished. Tenants would be extricated from the lease bargain if—through no fault of the tenant—the premises should be destroyed or severely damaged by the elements or any other cause which renders the premises uninhabitable. Finally, the landlord would no longer be required to insert a survival of liability clause in the default provision of the lease in order to obtain expectancy damages in the event of a termination of the lease agreement caused by a material breach by the tenant.

As explained in Part II, the following results would occur if a contract approach were applied to the law of real estate contracts and conveyancing instead of a property theory or conveyancing approach. Returning to the example used in Part II, suppose the seller, Olin Owner, and the purchaser, Pat Purchaser, sign a contract on January 1, 2003 whereby Olin agrees to sell and Pat agrees to purchase Blackacre for the sum of \$100,000. Pat makes a down payment of \$10,000 when the contract is executed and agrees to pay the \$90,000 balance of the purchase price on or before March 31, 2003, provided

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"[c]ontract principles established in other areas of the law provide a more rational framework for the apportionment of landlord-tenant responsibilities; they strongly suggest that a warranty of habitability be implied into all contracts for urban dwellings." *Id.* at 1080. Courts should also be encouraged where appropriate to look to the contract approach adopted by the U.C.C. with respect to the sale of personal property as helpful by way of analogy to the contract approach applicable to the law of contracts and conveyancing, including the law of servitudes. See discussion *supra* Parts II.E. and III (discussing the contract and property approaches to the law of servitudes and different means of implementing reform of contract and conveyancing law).

<sup>301</sup> See discussion of servitudes *supra* Part II.E.

that his attorney confirms that Olin is willing and able to deliver marketable fee simple title subject to only those encumbrances and other exceptions that are acceptable to Pat.

- (1) Suppose Blackacre is destroyed by fire on February 1, 2003 through no fault of either Olin or Pat and that there is no language on point in the contract. Under a contract approach, regardless of when the title is scheduled to pass or does pass, in any of the thirty-seven states that has not adopted the Risk Act,<sup>302</sup> the risk of loss automatically would be borne by the party in possession and/or receiving income from the property based on the probable intentions and bargaining expectations of the parties.
- (2) Suppose a farm house and barn are situated on Blackacre and the contract for sale includes a promise by Olin that he will double the size of the barn within one year after the signing of the contract. Based on normal bargaining expectations of lay-persons, both Olin and Pat would anticipate that some of their cross promises—as for example, Pat’s promise to deliver the balance of the purchase price and Olin’s promise to deliver marketable title—would have to be fulfilled before recording the memorandum of contract. Other promises, such as the promise by Olin to enlarge the barn, are not expected to be fulfilled until after title passes and the contract memorandum is recorded. Under a contract approach the merger doctrine would be abolished and all promises would be enforceable by way of a suit for damages or some form of equitable relief regardless of when title passes.<sup>303</sup>
- (3) Suppose Olin had a house built on Blackacre and a latent defect such as defective wiring is not discovered until three years later, after Pat sold Blackacre to Patricia Purchaser. Under a modern contract approach, Patricia can bring an action for damages against Olin or the builder, even though she is not in privity of contract with either of them. This result rests both on the theory, analogous to *Javins*, that a promise to build the house in a manner that would comply with the local building and safety code standards was implied in the original contract and also on the notion, explained in *Moxley*, that some injury to a remote purchaser, such as Patricia, would be foreseeable.<sup>304</sup>
- (4) Suppose the contract between Olin and Pat included a title promise by Olin that the title was good on the date when the contract was recorded and that he would defend the title and indemnify Pat against any loss caused by a failure of title. Five years later Pat is ousted by someone with better (“paramount”) title, and because of inflation in land prices and strong demand for housing Blackacre is now worth \$200,000. Under a contract approach Pat can recover his full expectancy damages

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<sup>302</sup> See *supra* note 129 and accompanying text; see also discussion *supra* at Part II.A.

<sup>303</sup> See discussion *supra* at Part II.B.

<sup>304</sup> See discussion *supra* at Part II.F.

based on the \$200,000 value of the land at the time he was evicted and his damages recovery would not be limited by any ceiling amount such as the \$100,000 price he paid for the property plus accrued interest.<sup>305</sup> In addition, under a contract approach, if Pat had sold Blackacre to Patricia and Patricia was ousted instead of Pat, then Patricia, the only party who was injured, could sue on the title promise made by Olin even though she was a remote vendee-grantee who received no direct promises from Olin.<sup>306</sup>

- (5) Finally, suppose Pat agreed to servitudes that will burden Blackacre, and it is clear from the language in the contract that both parties had intended that the benefits and burdens of the promises will inure to, or be binding on, their respective successors and assigns. Under a contract approach, the promises run with the land and are enforceable against subsequent parties regardless of whether they touch and concern the land, whether the horizontal and vertical privity requirements are met, and whether neighborhood conditions have changed, provided that these negative promises are enforceable under standard contract principles.<sup>307</sup>

#### V. PRACTICAL CONSIDERATIONS

How would the contract approach work under our present system if the real estate deed is to be discarded as obsolete and supplanted for recording statute purposes by a memorandum of contract? The law of states like New York already makes provision for the recording of executory contracts and memoranda thereof.<sup>308</sup> Under this approach, a notice of contract transaction pending—let us call it a *notice of contract*—would be recorded once the contract is signed. This act would put the world on notice that a contract transaction is taking place with respect to the land being sold much in the same way that a *lis pendens* notice would be filed in a land records office to put the public on notice that litigation is pending over a particular piece of real property. In fact, the same statutory provisions dealing with recording of *lis pendens* could be used to accommodate the recording of such *notice of contract*.<sup>309</sup>

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<sup>305</sup> See discussion *supra* at Part II.C.

<sup>306</sup> See discussion *supra* Part II.D.

<sup>307</sup> Essentially the same approach is followed by the RESTATEMENT (THIRD) OF PROPERTY except that its recommendations seem to be driven more by policy considerations than contract principles. See discussion *supra* Part II.E.

<sup>308</sup> See, e.g., N.Y. REAL PROP. LAW § 294 (McKinney 2001) (setting forth the procedure for recording executory contracts and powers of attorney).

<sup>309</sup> See, e.g., N.Y. C.P.L.R. § 6501 (McKinney 1980) (explaining the procedure for filing a notice of pendency and the effects, such as when there will be constructive notice, of doing so). As one court put it:

“A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as if

Returning to the hypothetical in Part II, assume that Pat pays the balance of the purchase price in three months and otherwise fulfills his obligations under the contract and Olin is willing and able to deliver a title that is marketable. Based on the results of a title search by the title company or Pat's lawyer, the parties would then confirm that the essential terms and conditions have been met, simultaneously cancel the *notice of contract*, and record the memorandum of contract. The latter would constitute legal evidence of title and record notice of Pat's ownership of Blackacre. Problems might arise, however, if any subsequent party is deemed to be put on inquiry notice<sup>310</sup> of the contents of the more detailed completed contract. Accordingly, the local recording statute in a notice and race-notice jurisdiction that recognizes inquiry notice would have to be amended to exclude the memorandum of contract as a source of inquiry notice as to the full contents of the entire contract. One advantage over the scanty deed format is that the memorandum of contract could contain valuable information about the property that could be useful to subsequent parties who search the land records, while excluding confidential information such as the price paid for the property. After the memorandum is recorded, Pat would be protected against subsequent parties and intervening lienors, just like a lender who engages in personal property financing would file a Uniform Commercial Code financing statement of record—under the rules of Article 9—to put third parties on notice of its security interest once it executes a security agreement with the borrower.

Assume, for example, that the contract is an installment contract and the purchase price is payable over five years. Once the *notice of contract* is filed, if during the installment period before title passes, Olin should sell the land to someone else or obtain a mortgage on Blackacre, then these third parties would take subject to Pat's rights. By paying the balance of the purchase price to Olin, Pat can still purchase the land and take possession of the property free

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he were a party." . . . By merely filing a notice of pendency, the "world [is put] on notice of the plaintiff's potential rights in the action and . . . warning all comers that if they then buy the realty . . . or otherwise rely on defendant's right, they do so subject to whatever the action may establish as the plaintiff's right."

Goldstein v. Gold, 483 N.Y.S.2d 375, 377-78 (N.Y. App. Div. 1984) (internal citations omitted) (notice of *lis pendens* filed prior to recording of subsequent purchaser's deed precluded him from becoming a bona fide purchaser for value without notice and precluded the purchaser from cutting off the rights of a mortgagee), *aff'd in part*, 68 N.Y.2d 624 (N.Y. 1985).

<sup>310</sup> Reference in a recorded instrument to an unrecorded document is inquiry notice of the latter. *See, e.g.*, Guerin v. Sunburst Oil & Gas, 68 Mont. 365, 370 (1923 (holding that one is charged with constructive notice of any recital within a recorded agreement as well as notice of all "material facts which an inquiry suggested by that recital would have disclosed"). In *Guerin*, the purchaser took subject to an unrecorded lease because reference to the lease in a recorded option agreement was deemed to be inquiry notice of the lease. *Id.* Under U.S.L.T.A. § 2-309, one document can refer to another recorded document or incorporate the latter document by reference and thereby impart notice of it to subsequent purchasers and encumbrancers.

and clear of any third-party rights and liens. The only possible recourse of the subsequent purchaser or mortgagee would be against Olin personally and not against the property. Accordingly, a purchaser who immediately records his notice of contract or memorandum of contract would be protected against subsequent purchasers or encumbrancers in all jurisdictions, regardless of whether the state has a notice, race-notice, or race type of recording statute. A seller-purchaser index would replace the current grantor-grantee index system and matters outside the chain of title would still comprise record notice in those counties that retain a tract index system such as the five counties in New York City and Nassau County.<sup>311</sup>

So the memorandum of contract would supplant the deed as the instrument of conveyance and recordation. But what about quitclaim deeds? Suppose that before the sale to Pat Purchaser, Olin's lawyer discovers an old mortgage lien on Blackacre that had not yet been released of record and in respect to which the statute of limitations had not yet expired. Even though the mortgagee's estate had been settled years ago, it is possible that the mortgagee could have assigned the mortgage claim before he died. Consequently, there could be a cloud on the title that might render the title unmarketable unless the mortgagee's heirs are willing to release any claim they might still have. Customarily, Olin's lawyer would attempt to solve the problem by offering nominal consideration to the heirs in exchange for a quitclaim deed that would relinquish any claim or security interest they might still have in the property, or in the alternative, by agreeing to escrow the amount of the debt claim until the statute of limitation for enforcing the mortgage expires.

In that regard, could a completed contract under the proposed model supplant a quitclaim deed when such deed is being promised and used for the purpose of *releasing* rather than *transferring* an interest in real property in exchange for nominal consideration? According to § 74(2) of the Restatement (Second) of Contracts, such a promise to execute a release for the benefit of a party, who would be subject to the claim and wants assurance of its non-existence, is legal consideration so long as the surrendering party is under no duty to execute the surrender instrument and there is no improper pressure or deception.<sup>312</sup> If no promise is involved, the surrendering party would merely execute a simple "Release" form, or in the case of a gift, a so-called "Deed of Gift" form. Finally, to make the contract approach more feasible, technical changes might need to be made in those statutes that make a distinction

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<sup>311</sup> See *Andy Assocs. v. Bankers Trust Co.*, 49 N.Y.2d 13, 24 (1979) (holding that, where the "block and lot" indexing method is in effect, the "time-honored rule that a purchaser is not charged with constructive notice of conveyances recorded outside of his direct chain of title" is not applicable).

<sup>312</sup> RESTATEMENT (SECOND) OF CONTRACTS § 74, cmt e. & ill. 10 (noting that "the execution of an instrument of surrender may be consideration if there is no improper pressure or deception" and providing an explanatory example); see also CALAMARI & PERILLO, *supra* note 5, § 4.8 ("A promise to surrender a *valid* claim constitutes a detriment and, if bargained for, constitutes consideration.") (emphasis in original).

between a contract and a conveyance. For example, under the Bankruptcy Code, contracts for the sale of real estate may be rejected as executory contracts unless the purchaser is in possession of the real estate.<sup>313</sup> The “completed contract” that is placed of record as the sole instrument of conveyance should not be considered an executory contract subject to rejection even if the purchaser is not in possession. However, to make this clear, a technical amendment to the Bankruptcy Code might be advisable, indicating that the “completed contract” is not subject to rejection.

#### CONCLUSION

The marketplace for land transactions has dramatically changed since the formulation of property theory back in the early common law days when England was a simple “one land-use” agrarian society. The time has come for change in the law. We can best achieve reform in conveyancing law by using the established and familiar body of contract law that for the most part is modern, clear and uniform. Why invent new rules to modernize property theory when an existing body of law can achieve the same result without defeating the normal bargaining expectations of the parties? Why rely on amelioratory statutes like the Risk Act for “band-aid” solutions? The contract and not the deed should govern the conveyancing transaction because the legal rights and responsibilities of the parties in the transaction should not necessarily hinge on when title passes but rather on the bargaining expectations of the parties. For example, in the absence of language on point in the agreement, the question as to who should bear the risk of loss, if a loss should occur between the contract date and closing date, should not arbitrarily depend on when the title passes. Rather, it should depend on the normal, albeit implied, bargaining expectation that the party in possession—who was bearing the fruits of the possession—should also be bearing the burdens of possession, including the risk of loss.

The U.C.C.-U.L.T.A. model did not fail as a reform measure because it espoused freedom of contract principles or a U.C.C. approach. It failed because a case law, and not a model statutory approach, is what is needed to shake conveyancing law out of its comatose state. In contrast to statutory reform, judicial reform based on a contract approach (with the Restatement of Property as the reformist engine) is gradual and flexible enough to address the concerns of those special interests in the conveyancing industry that have been fearful of losing business as a consequence of eliminating local law variations and changing the status quo. Contract theory is flexible enough to take into account the intrinsic differences between personal and real property; for example, an aggrieved purchaser may seek the equitable remedy of specific performance in a transaction involving unique real estate but not in one involving fungible personal property. Moreover, under a contract approach that downplays the significance of the real estate deed and passage of title as a

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<sup>313</sup> 11 U.S.C. § 365(i) (1994).



problem-solving modality, the concept of title as legal evidence of ownership would still remain as a bulwark of conveyancing law. Whether or not the more radical idea of substituting the contract for the deed is ever adopted, under the contract approach the recording statute/title insurance system would still dominate the transactional side of the law.

Finally, contract theory is flexible enough to ensure both freedom of contract and alienability, and it is structured enough to create consistency and fair remedies while protecting the property market from ambiguous (“muddy”) rules and unpredictable results. In short, the contract model strikes the right balance by making the law responsive to the needs of the parties without upsetting the reliance factor and the sensitivities of local industry participants. The “contract approach” may not become the grand-unification theory for modernizing and reforming landlord-tenant and conveyancing law. It may, however, help introduce more clarity and consistency in these areas of property law where chaos and confusion reign supreme and where for many decades the formalism and obsolescence of property theory has kept us stuck in the past.